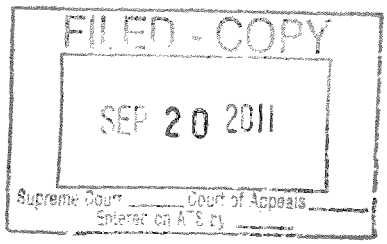
9-20-2011

Idaho Dept of Health and Welfare v. McCormick Respondent's Brief Dckt. 38694

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF: GEORGE D. PERRY, IDAHO DEPARTMENT OF HEALTH AND WELFARE, Petitioner-Appellant, vs. BARBARA K. MCCORMICK, Personal Representative of the Estate of George D. Perry, Respondent on Appeal.	SUPREME COURT NO. 38694



RESPONDENT'S BRIEF

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APPEAL FROM THE FOURTH JUDICIAL DISTRICT, ADA COUNTY, IDAHO

* * *

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I. STATEMENT OF THE CASE

Nature of the Case

The main issue on appeal is whether this Court should allow the Idaho Department of Health and Welfare's ("Department") to continue a decade long practice of making impermissible and overly broad estate recovery claims. This case requires review of a federal statute (42 U.S.C. § 1396p(b)) and Idaho Code ("I.C.") § 56-218 and IDAPA 16.03.09.900[1], and a determination as to whether the Department's claim premised on state law conflicts with federal law and is therefore preempted by federal law.

Federal law requires the states to make claims against the probate estates of Medicaid recipients to recover correctly paid benefits. Federal law also allows the states to expand the definition of "estate" to include non-probate assets owned by a recipient at the time of the recipient's death. Idaho has chosen this expanded definition of "estate." I.C. § 56-218(4)(b). Nothing in the federal medical assistance statutes authorizes a direct medical assistance estate claim against the estate of any person other than the recipient of benefits.

Under federal law, the states are permitted to pull back into a recipient's estate any property or other assets in which the recipient held a legal title or interest at the time of the recipient's death (to the extent of the interest). Idaho's estate recovery statute, I.C. § 56-218(1), requires that a medical assistance claim be filed against the estate of a deceased recipient, but also expands recovery claims beyond that allowed by federal law and authorizes claims against the estate of the recipient's spouse who never received Medicaid benefits. The Department's

[1] (now IDAPA 16.03.09.905)

claim against George D. Perry's ("George") Estate ("Estate"), premised on I.C. § 56-218 (R, p. 22), conflicts with federal law because the Department asserts a claim against George's Estate which does not contain any assets in which Martha J. Perry ("Martha") held a legal title or interest at the time of her death.

The magistrate in this case upheld the Personal Representative's ("PR") disallowance of the Department's claim and the district court affirmed that decision. A second Idaho magistrate also rejected the same type of overly broad estate recovery claim the Department makes herein and that decision was recently affirmed by another Idaho district court acting in its appellate capacity. *In The Matter of the Estate of Vivian Wiggins and Emerson D. Wiggins*, Case No. CV-2009-1926 (Idaho Third Judicial District, July 20, 2011). For the Court's convenience, the magistrate's decision in *Wiggins* is attached hereto as **Appendix 1** and the *Wiggins* district court decision is attached as **Appendix 2.**

Statement of Facts

The PR respectfully refers the Court to the Affidavit of Barbara McCormick and the exhibits attached thereto for a detailed rendition of the facts. R., p. 93-110. Martha owned the couple's home as her separate property prior to her marriage to George. R., p. 133. On November 18, 2002, Martha executed a deed conveying the home to "Martha Jean Perry and George Donald Perry" as grantees. It was recorded the same day. R., p. 134-135.

On July 31, 2006, George conveyed Martha's remaining interest in the couple's real property to himself, acting as her agent pursuant to Martha's power of attorney. R. p. 433. This deed was also recorded on the date it was signed. R., p. 99. The PR sold the home after

George's death and filed a 90 day inventory listing the house sale proceeds in George's Estate as his separate property. There was no community property listed in the inventory. R., p. 108. The Department never objected to the characterization of property in this inventory. The only property that Martha owned at the time of her death was one financial account located at Wells Fargo. The balance of this Wells Fargo checking account was paid to the Department on August 13, 2010 after Martha died. R., p. 96, 110.

II. ISSUES ON APPEAL/ADDITIONAL ISSUE

The Department does not fairly state the issues presented in this appeal as required by I.A.R. 35(a)(4) but instead frames them to argue its case. Those issues, fairly stated, are:

1. Whether the magistrate erred in its application and interpretation of I.C. § 56-218, in refusing to allow the State's claim against George's Estate.

2. Whether the magistrate erred in its application and interpretation of 42 U.S.C. § 1396p as preempting application of I.C. § 56-218 and the Department's regulations.

3. Whether the magistrate erred in failing to apply *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998) to the facts of this case.

4. Whether the magistrate erred in holding that Martha's power of attorney gave George, as her agent, sufficient authority to convey Martha's interest in the home to George.

The PR adds the following issue on appeal.

5. Whether the Estate is entitled to attorney fees on appeal.

III. ARGUMENT

A. OVERVIEW OF STATE AND FEDERAL LAW GOVERNING RECOVERY OF MEDICAL ASSISTANCE BENEFITS CORRECTLY PAID

i. Statutory Framework.

The Medicaid program is jointly funded with the states as a "cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons." *Harris v. McRae,* 448 U.S. 297, 308, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Participating states enact legislation and rules, incorporate them into state medical assistance plans, and submit those plans to the U.S. Secretary of Health and Human Services ("HHS") for approval. 42 U.S.C. § 1396a(a)-(b) (2000 & Supp. III 2003). After this, the states can receive federal payments. 42 U.S.C. § 1396 (2000). Each state administers its own program within the federal requirements, and the Center for Medicare and Medicaid Services ("CMS") administers the program and approves state plans. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

When determining the eligibility of a married person to receive Medicaid, states consider assets of both husband and wife as available to the spouse requesting benefits. 42 U.S.C. § 1396r-5(c) (2000). There are several provisions in place to protect the community spouse (the spouse not applying for Medicaid) from being impoverished as a result of the spend down of assets needed to qualify the applicant for Medicaid[2]. Medicaid balances the obligation of

[2] Typically, a married couple is required to "spend down" one-half of their "countable" resources before one spouse will qualify for Medicaid. The value of the couple's home is not included among assets considered eligible to pay for medical care. 42 U.S.C. § 1396r-5(c)(5); 42 U.S.C. § 1382b(a)(1) (2000). The community spouse of a Medicaid

community spouses to contribute to the payment of medical expenses for their recipient spouses against the accommodation of the community spouse's need for his or her own support.

ii. Federal Medicaid Estate Recovery Provisions.

It is important to understand pre-1993 federal law on Medicaid recovery, to give context to the post-1993 changes, and because pre-1993 law is the basis for the sole case in Idaho upon which the Department relies exclusively for its position – i.e. *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998). Prior to amendments adopted in the Omnibus Budget Reconciliation Act ("OBRA") of 1993, the federal Medicaid statute stated a general principle that there should be no recovery of correctly paid Medicaid benefits, subject to several exceptions, one of which is relevant here:

> **No** adjustment or **recovery** of any medical assistance correctly paid on behalf of an individual under the State plan **may be made, except** --
> * * * *
> (B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate. (emphasis added)

42 U.S.C. § 1396p(b)(1) (1988). Under this pre-1993 law, states were allowed, but not required, to recover Medicaid benefits paid to recipients 65 or older, and the statute specified the recovery would be from the recipient's estate[3].

Section 1396p(b) was amended as part of the OBRA amendments of 1993[4]. As

---

recipient is also entitled to an allowance of income and assets designated for his or her needs that is not considered available to pay for the recipient spouse's medical care. 42 U.S.C. § 1396r-5(d). Furthermore, the recipient spouse has the right to transfer assets, including an interest in the homestead, to his or her community spouse. 42 U.S.C. § 1396p(c)(2).

[3] The statute also provided that this recovery from the recipient's estate could only be made after the death of the recipient's surviving spouse. 42 U.S.C. § 1396p(b)(2) (1988). Despite this prohibition against recovery before the death of a surviving spouse, there was no express mention of recovery from the estate of a surviving spouse. The pre-1993 federal law contained no definition of the term "estate."

amended, the federal law retained the general prohibition against states attempting to recover Medicaid payments correctly paid on behalf of an individual, **with three (3) specific and limited exceptions**. 42 U.S.C. § 1396p(b) (2000). The 1993 amendments changed section 1396p(b) in several ways. First, the 1993 amendments lowered the age criterion for recovery from 65 to 55. Second, the 1993 amendments made recovery allowed by the exceptions mandatory rather than permissive. Third, the amendments added a definition of "estate," which itself had both mandatory and permissive elements. As amended, the general nonrecovery rule and the three limited exceptions are as follows:

> (1) **No** adjustment or **recovery** of any medical assistance correctly paid on behalf of an individual under the State plan **may be made, except that the State shall seek adjustment or recovery** of any medical assistance correctly paid on behalf of an individual under the State plan **in the case of the following individuals**:
>
> (A) **In the case of an individual** described in subsection (a)(1)(B) of this section, **the State shall seek adjustment or recovery from the individual's estate** or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.
>
> (B) **In the case of an individual** who was 55 years of age or older when the individual received such medical assistance, **the State shall seek adjustment or recovery from the individual's estate,** but only for medical assistance consisting of-
>
> > (i) nursing facility services, home and community-based services, and related hospital and prescription drug services, . . .
>
> (C) (i) **In the case of an individual** who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, **the State shall seek adjustment or recovery from the**

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[4] OBRA of 1993, Pub.L. No. 103-66, § 13612(a), (c), 107 Stat. 312, 627-28 (codified as amended at 42 U.S.C. § 1396p(b)(1), (4) (2000)).

> **individual's estate** on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services. (emphasis added)

Id.

Under all three of the limited exceptions listed above, recovery is allowed only against the estate of the individual who actually received the benefits (the recipient). The amended version of section 1396p(b)(1)(B), at issue in the case at bar, retained the express reference to recovery from the Medicaid recipient's estate. Furthermore, as was true pre-amendment, this recovery from the recipient's estate is only permitted after the death of the recipient's surviving spouse. 42 U.S.C. § 1396p(b)(2). As with the pre-1993 version, the amended federal statute contains no express authorization for, or reference to, recovery from a surviving spouse's estate.

The 1993 amendments added a definition of "estate" for purposes of Medicaid recovery, with a mandatory provision that looks to state probate law and an optional provision that authorizes states to expand the definition beyond the scope of probate law:

> [T]he term "estate" with respect to a deceased individual –
>
> (A) **shall** include all real and personal property and other assets **included within the individual's estate, as defined for purposes of State probate law**; and
>
> (B) **may** include, at the option of the State * * * any other real and personal property and other assets **in which the individual** had any legal title or interest *at the time of death (to the extent of such interest), including* such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4) (emphasis added).

Under this provision, a state has the option to adopt a definition of "estate" for Medicaid

recovery purposes that includes some assets which, *under ordinary probate law*, would not be part of the Medicaid recipient's estate, because they would pass automatically to someone else on the recipient's death[5]. Thus federal statutes place limits on the state's powers to define the scope of recovery of medical assistance benefits correctly paid. The limits are set forth in 42 U.S.C. § 1396p. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

iii. Idaho's Medicaid Estate Recovery Provisions.

Idaho Code I.C. § 56-218, entitled "RECOVERY OF CERTAIN MEDICAL ASSISTANCE" states in pertinent part,

> (1) Except where exempted or waived in accordance with federal law medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the individual received such assistance **may be recovered from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both**: . . .
>
> (4) For purposes of this section, the term "estate" shall include:
>
> (a) All real and personal property and other assets included **within the individual's estate, as defined for purposes of state probate law**; and
>
> (b) Any other real and personal property and other assets **in which the individual** *had any legal title or interest at the time of death, to the extent of such interest, including* such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement. (emphasis added).

Idaho has adopted *verbatim* the optional federal provision that authorizes states to expand the definition of "estate" beyond the scope of state probate law. I.C. § 56-218(4)(b). Therefore,

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[5] For example, when two persons hold property in joint tenancy with a right of survivorship and one dies, the deceased joint tenant's interest ordinarily passes directly to the surviving joint tenant and is not part of the probate estate. Under the optional expanded definition of "estate" allowed by federal law, for Medicaid recovery purposes the interest of a deceased joint tenant who had received Medicaid would be included in his estate, rather than passing directly to the surviving joint tenant.

it follows that Idaho is required to abide by the way in which CMS and HHS read the language in the federal statute. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the U.S. Supreme Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. **First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress**. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (emphasis added).

Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (footnotes omitted).

The U.S. Supreme Court went on to indicate that when a statutory scheme has been entrusted to an agency, "considerable weight should be accorded to an executive department's construction." 467 U.S. at 844, 104 S.Ct. at 2782. This same principle holds true with regard to HHS's reading of the Medicaid statutes. In *Wisconsin Dept of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002), the Court stated,

> The Secretary's position warrants respectful consideration. Cf. *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994) (reliance on Secretary's "significant expertise" particularly appropriate in the context of "a complex and highly technical regulatory program" (internal quotation marks omitted)); *Schweiker v. Gray Panthers,* 453 U.S. 34, 43-44 (1981) (Secretary granted "exceptionally broad authority" by Congress under the Medicaid statute).

B. THE DEPARTMENT MUST ACT CONSISTENTLY WITH FEDERAL LAW.

In *In the Matter of Appeal of Stafford*, 181 P.3d 456, 461 (2008), this Court stated,

> Following passage of the MCCA [Medicare Catastrophic Coverage Act], the director of the Department requested the Attorney General's opinion as to whether legislation was required to implement its provisions. The Attorney General responded:
>
> **While participation in the Medicaid program is voluntary, a state that chooses to participate must comply with all requirements imposed by the federal statutory provisions and by regulations promulgated by the Secretary of the U.S. Department of Health and Human Services.** . . . (emphasis added).

One of the requirements imposed on states in order to participate in the Medicaid program and receive federal funding is that the state **must** "comply with the provisions of [42 U.S.C. § 1396p]. . ." 42 U.S.C. § 1396a(a)(18) (2000). To the extent a state statute "seeks to reach further than § 1396p(b)(1), it cannot stand." *Bucholtz v. Belshe*, 114 F.3d 923, 925 (9th Cir. 1997). The Department does not have a choice in this matter. It must follow federal law[6].

Idaho law currently allows the state to seek recovery for medical assistance paid "from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both." I.C. § 56-218(1). The PR has challenged the Department's use of I.C. § 56-218(1) to impermissibly expand estate claims in Idaho beyond that allowed by federal law[7]. The PR also challenges certain state regulations, such as IDAPA 16.03.09.900.20 and 16.03.09.900.24 (now found at IDAPA 16.03.09.905) that also reach further than the limited estate recovery allowed under 42 U.S.C. § 1396p(b). These regulations are also preempted by federal law.

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[6] The Department does recognize that it "is bound by federal law." Department's Memorandum in Support, p. 15, f.n. 11, R., p. 125.

[7] For instance, there may exist some circumstances in which an asset in which the Medicaid recipient holds an interest at death passes automatically upon death to the surviving spouse's estate. In that circumstance, the asset *would* be recoverable from the surviving spouse's estate. For example, assets held jointly with rights of survivorship would fall into this category. That is not the case with regard to the Department's claim in this case.

C. THE DEPARTMENT'S CLAIM GOES TOO FAR, SEEKING TO RECOVER AGAINST ASSETS THAT ARE NOT PART OF MARTHA'S ESTATE.

In order to be consistent with federal law, recovery claims against a Medicaid spouse's estate must be against "assets in which the individual [Medicaid recipient] had any legal title or interest at the time of death, to the extent of such interest." 42 U.S.C. § 1396p(b)(4)(B). *See also*, I.C. § 56-218(4)(b). This Court should affirm the magistrate's order disallowing the Department's claim because that claim is against assets in which the Medicaid recipient (Martha) had no legal title or interest *at the time of her death.*

The Magistrate recognized this core issue in his Order Disallowing Claim, p. 3 (R., p. 507), stating,

> Jackman does not directly address the critical question for our case: **To what time, during the marriage, may the court look in assessing a Medicaid recipient's interest in property – any time (after 1993) during the couple's marriage or the time of the recipient's death.** (f.n. omitted) (emphasis added).

The District Court agreed with the Magistrate that the Department's argument on this point was without merit[8]. R., p. 713.

The Department also relies on IDAPA 16.03.09.900.20 as support for its position. Appellant's Brief, p. 12. That regulation states in part,

> Limitations on Estate Claims. **Limits on the Department's claim against the assets of a deceased participant or spouse are subject to Sections 56-218** and 56-218A , Idaho Code. A claim against the estate of a spouse of a participant is limited to the value of the assets of the estate that had been, at any time after October 1, 1993, community property, or the deceased participant's share of the separate property, and jointly owned property. . . (3-30-07) (emphasis added).

[8] The magistrate in *Wiggins* also held that "The Department may only recover against property in which the recipient spouse had an interest at the time of her death." **Appendix 1**, Memorandum Decision, p. 7. The District Court in *Wiggins* affirmed. **Appendix 2**, Memorandum Decision on Appeal, p. 6.

Despite stating that this regulation is "subject to" I.C. § 56-218 (which includes subsection (4)(b)), the regulation then goes on to expand the definition of recoverable assets well beyond the limitations set forth in I.C. § 56-218(4)(b) and 42 U.S.C. § 1396p(b)(4)(B)[9]. As discussed below, the Magistrate properly ruled in rejecting the Department's "asset" vs. "estate" argument and this Court should affirm that decision in its entirety.

D. FEDERAL LAW PREEMPTION OF STATE LAW

Congress may preempt state law in several ways. *Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). Even when Congress has not chosen to displace state law expressly or by fully occupying the field, "federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law." *Cal. Fed. Sav. & Loan Ass'n,* 479 U.S. at 281, 107 S.Ct. 683. Conflict preemption occurs when compliance with both state and federal laws is impossible. *Fla. Lime Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Conflict preemption also occurs when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)[10].

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[9] IDAPA 16.03.09.900.18 (now 16.03.09.904.05) entitled "Assets in Estate Subject to Claims" implicitly recognizes the appropriate limitation on recovery claims when it states, "Assets in the estate from which the claim can be satisfied must include all real or personal property that the deceased participant owned or in which he had an ownership interest, including the following..." The list that follows includes a variety of assets all of which have one thing in common – the participant owned a legal title or interest in the asset at the time of death or acquired the asset post-mortem.

[10] The District Court also provides a concise and thorough review of the preemption doctrine and how it applies in this case in its Memorandum Decision and Order, p. 12-16; R., p. 716-720.

E. THE DEPARTMENT'S OVERLY BROAD RECOVERY CLAIM, BASED ON I.C. § 56-218 AND ITS REGULATIONS, CONFLICTS WITH FEDERAL LAW, AND IS PREEMPTED BY FEDERAL LAW.

The Department's practice of using I.C. § 56-218 to improperly expand the scope of estate recovery claims in Idaho violates federal law and is preempted by federal law. Compliance with both state and federal law is impossible when the Department makes overly broad estate recovery claims based on I.C. § 56-218 that reach beyond the explicit limits to recovery set by federal law. This impermissible expansion occurs because the Department makes a claim against assets which Martha did not own a legal title to or interest in at her death. As the district court stated,

> . . .[T]he federal government has outlined a general rule prohibiting recovery. As such, Congress has indicated its object and desire to prevent recovery in all but limited number of circumstances. **It follows then, that if these circumstances are expanded by a particular state law, the state law becomes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress to limit recovery, and is thereby preempted**. . . .
>
> **As discussed in detail above, the federal provisions limit such recovery to assets of the spouse in which the recipient had an interest at death**.
>
> Because the federal provisions seek, overall, to limit recovery except in certain circumstances, because exceptions to a general statement of policy are to be construed narrowly, and **because the state provisions expand this recovery policy, the Court finds the State provisions are preempted**. *Comm'r v. Clark*, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed2d 753 (1989). (emphasis added).

R., p. 718-720.

In *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 215-216, 970 P.2d 6, 8-10 (1998), this Court held that the version of I.C. § 56-218 then in effect (pre-OBRA 1993) authorized the Department to recover against the surviving spouse's estate but expressly

recognized that such recovery was limited by federal law to assets that were part of the Medicaid recipient's estate *as defined under state probate law*. The *Jackman* Court recognized that federal law does preempt the state law contained in I.C. § 56-218, and held that the only asset that might be recoverable from the surviving spouse's estate was community property accumulated by the couple after the execution of their marriage settlement agreement. *Id.* at 215-216. This Court has already recognized, therefore, that federal law does preempt in the area of Medicaid recovery claims – i.e. with respect to I.C. § 56-218.

As discussed *infra*, the Department has misread and misapplied *Jackman* for over a decade. Unfortunately, what ensued after the *Jackman* decision was that the Department enacted rules (*e.g.* IDAPA 16.03.09.900.20 and .24), and made claims in married couple Medicaid cases as if the Court had ruled on the very issue it explicitly did not rule upon. The Department's regulations (state law) conflict with federal law and are preempted by federal law.

F. A RECENT MINNESOTA SUPREME COURT DECISION AND THE PROCEDURAL AFTERMATH OF THAT DECISION ARE DIRECTLY ON POINT AND SUPPORT AFFIRMING THE MAGISTRATE'S ORDER.

In Re Estate of Barg, 752 N.W. 2d 52 (Minn. 2008) is the latest state court decision on point and is on all fours with the instant case. The Court's analysis in *Barg* provides an in-depth and exhaustive review of other state court cases analyzing the issue. Reading *Barg* in its entirety is very instructive because Minnesota's department of health and welfare made the *very same* argument in support of its recovery action as the Department makes in this action. The facts of *Barg*, when pared down to the essentials, are essentially the same facts present in this probate.

In *Barg*, *supra* at 73-74, the Minnesota Supreme Court struck down a provision of the

state's Medicaid estate recovery statute that allowed recovery from the estate of a surviving spouse for any assets jointly owned by the couple *at any point during their marriage*[11]. In that case, Mrs. Barg transferred her partial interest in the couple's home to her husband when she entered a nursing home. She died without leaving a probate estate and her husband died soon thereafter. The county then sought recovery against Mr. Barg's estate for the amount of Medicaid benefits paid out on behalf of Mrs. Barg. The *Barg* Court determined that the county could recover only from assets that the Medicaid recipient had a legal interest in at the time of her death. Mrs. Barg had no legal interest in any property when she died because she had transferred her interests to her husband while she was alive. Therefore, the Court ruled that the county had no way to seek recovery from Mr. Barg's estate[12]. *Id.*

The Supreme Court of Minnesota discussed 42 U.S.C. § 1396p(b) in depth. This discussion is directly applicable to the instant case because **Idaho has adopted the federal language in that statute *verbatim* in I.C. § 56-218(4)(b)**. In discussing the statutes at issue the Court rejected the Department's argument that use of the word "assets" in 42 U.S.C. § 1396p(b)(4)(B) permitted recovery against assets which the Medicaid recipient transferred *inter vivos*. The *Barg* Court also rejected the argument that the "other arrangement" phrase opened the door for the broader recovery allowed under Minnesota's statute.

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[11] In this regard, IDAPA 16.03.09.900.20 is just as impermissibly expansive as was the statute in *Barg* that the Court held was preempted by federal law.

[12] These are the same facts present in the instant case. Martha transferred her remaining interest in the couple's home to her husband in 2006, prior to applying for Medicaid benefits. She retained no legal interest in that real property, nor in the proceeds from the sale of that real property, which are the only assets that make up her husband's estate.

With the Court's indulgence, the *Barg* opinion is cited at length below because it is so directly on point with the case at bar. The Court stated in pertinent part,

> **We turn to a determination of whether the scope of recovery from a surviving spouse's estate allowed under Minnesota law is consistent with federal law.** Subdivision 2 of Minn.Stat. § 256B.15 allows the state to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage.*" (Emphasis added.) The County argues that this broad estate recovery authority does not conflict with federal law because the pre-1993 version of section 1396p(b) should be construed broadly and the 1993 amendments were intended to expand, not restrict, state estate recovery authority. In asserting this argument for broad estate recovery authority, the County emphasizes that it is consistent with the dual goals of federal law of recouping Medicaid expenses to make assistance available to more qualifying recipients, while protecting community spouses from pauperization during their lifetimes. The Estate argues that, because section 1396p(b)(1) allows recovery only from a recipient's estate and section 1396p(b)(4) allows expansion of the estate only to include assets in which the recipient had an interest at the time of death, the "any time during the marriage" recovery allowed by subdivision 2 is preempted.
>
> **The County's argument would take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language. Significantly, no court has embraced the County's argument that the pre-1993 federal law authorized recovery from a surviving spouse's estate of assets that were jointly owned during the marriage <u>but transferred by the recipient spouse prior to her death</u>.** . . .
>
> **We return again to the language of the federal statute.** The federal optional definition of "estate" allows inclusion of
>
> > any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including *such assets* conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.
>
> 42 U.S.C. § 1396p(b)(4)(B) (emphasis added). **The "including" clause further describes the assets that a state may include in this expanded estate. The**

clause describes those assets in two ways--first by the limiting adjective "such," and second by the language describing how and to whom "such assets" are "conveyed." **The "such" limitation plainly refers back to the immediately preceding clause describing the assets as those "in which the individual had any legal title or interest at the time of death." The including clause then describes to whom "such" assets may have been conveyed--a "survivor, heir, or assign *of the deceased individual.*" *Id.* (emphasis added). And finally, the clause describes several methods by which the conveyance of "such" assets might take place -- "through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement."** *Id.*

Inclusion in the list of examples of "such assets" is predicated on the recipient having a legal interest at the time of death. When we construe a federal statute we must, if at all possible, give effect "to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). **To read "other arrangement" to include a lifetime transfer would be to read the words "at the time of death" out of the statute. The conclusion that "other arrangement" cannot include lifetime transfers is further supported by the additional context. "[O]ther arrangement" ends a list of examples of conveyances that occur at the time of death. The list of recipients of the conveyance, "a survivor, heir, or assign of the deceased individual," leaves no doubt that the "individual," a Medicaid recipient, must have died for the conveyance to occur. A recipient cannot have heirs or survivors during his or her lifetime. Nor can there be an "assign of the deceased" during the recipient's lifetime. In light of the plain statutory language and its context, the conclusion of the *Wirtz* court that "other arrangement" is sufficiently ambiguous to include lifetime transfers is unreasonable.**

We conclude that there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death. As explained above, the rationale for finding authority to recover from a surviving spouse's estate at all emanates from the authority granted in the federal law to recover from the "estate" of the Medicaid recipient. Property transferred prior to death would not be part of the recipient's estate. Further, as recognized by every decision except *Wirtz*, to the extent the 1993 amendments allow states to expand the definition of "estate" for Medicaid recovery purposes, the language of the federal law clearly limits that expansion to assets in which the recipient had an interest at the time of her death. Accordingly, we hold that Minn.Stat. § 256B.15, subd. 2, is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the

> **recipient owned as marital property or as jointly-owned property *at any time* during the marriage. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death.** (Emphasis added)

Id. at 68-71.

The State of Minnesota filed a writ of certiorari to the U.S. Supreme Court seeking to overturn the Minnesota Supreme Court's ruling in *Barg*. The U.S. Supreme Court issued an order inviting the Solicitor General to express the views of the United States on the matter. Appendix 3, p. 1. In May of 2009, the U.S. Solicitor General submitted an *amicus curiae* brief authored by not only that office but joined by the attorneys from the Department of HHS in response to the U.S. Supreme Court's request. **This is the most recent legal briefing by HHS on the issue.** The United States' brief examines and rejects each and every argument posited by the State of Minnesota seeking to expand Medicaid estate recovery beyond that allowed by federal law. For the Court's convenience, the entire United States Solicitor General's *amicus curiae* brief is appended hereto as **Appendix 3**.

The import of the United States' briefing in this matter cannot be overemphasized. The legal positions taken in that brief represent HHS's reading of the federal law at issue in this case. CMS, as noted above, is governed by HHS. By accepting federal support for its Medicaid program, Idaho is legally obligated to abide by HHS/CMS's view of federal Medicaid law. Congress has extended HHS extremely broad authority in the Medicaid area. *See Chevron* and *Blumer, supra.*

In its 2009 *amicus* brief, HHS expressly rejects the interpretation and rationale that the

Department relies upon in using I.C. § 56-218 to support the claim made against George's Estate. The United States/HHS stated in pertinent part,

> The Minnesota Supreme Court's decision is correct and does not warrant further review. **The federal Medicaid Act permits recovery of correctly paid benefits from the estate of the recipient's surviving spouse, but limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death** . . .
>
> A. The Decision Of The Minnesota Supreme Court Is Correct
>
> 1. **The Minnesota Supreme Court correctly concluded that the Medicaid Act forbids petitioner from seeking to recover correctly paid benefits from assets in which the Medicaid recipient had no legal interest at the time of her death.**
>
> . . . **the Medicaid Act, which permits recovery only after the death of the recipient's surviving spouse, 42 U.S.C. 1396p(b)(2), authorizes a State to file a reimbursement claim against the surviving spouse's estate, up to the value of any assets in which the Medicaid recipient had a legal interest at the time of her death**.
>
> **The Minnesota estate-recovery law exceeds the scope of that authorization. It permits the State to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property** ***at any time during the marriage,*** " Minn. Stat. Ann. § 256B.15, subd. 2 (2007) (emphasis added), **without regard to whether the recipient retained an interest in the assets at the time of her death. Because a State may not recover correctly paid Medicaid benefits except to the extent authorized by federal law, see 42 U.S.C. 1396p(b)(1), Minnesota's statute conflicts with federal law and is therefore preempted.** . . . (emphasis added).

Appendix 3, p. 8-9. The United States Supreme Court invited the Solicitor General's briefing/opinion on the matter. The Court decided not to grant *cert* in *Barg*. It is reasonable to assume the Court accepted the Solicitor General's view of the matter.

G. THE *JACKMAN* DECISION IS NEITHER CONTROLLING, NOR DISPOSITIVE.

In 2005, this Court considered the Department's claim filed in the probate of a Medicaid recipient's estate whose spouse survived him. *In Re Estate of Kaminsky*, 141 Idaho 436, 111 P. 3d 121 (2005). In *Kaminsky*, the Court recognized that the Department's recovery claim was properly made only against the Medicaid recipient's estate. The Court stated,

> Only persons with few financial resources qualify for assistance and assistance comes with strings attached. **Included in these strings is a right on the part of the State, pursuant to I.C. § 56-218, to obtain reimbursement of Medicaid assistance from the estate of a recipient. Under any reasonable definition, this right of recovery constitutes a "claim" against the recipient's estate.** (emphasis added).

Id. at 439. This is entirely consistent with federal law which sets forth a general rule of nonrecovery, and then provides an exception that is limited to recovery against the recipient's or the individual's estate. 42 U.S.C. § 1396p(b)(1)[13]. In *Wiggins, supra at 10*, the District Court stated, "The Department admitted that the state and federal definitions of "estate" apply only to the "individual's" estate (i.e. recipient, not spouse of recipient)."

i. The *Jackman* Decision Is A Pre-OBRA 1993 Case. This Court Has Never Ruled On The Post-OBRA 1993 Issue On Appeal.

As it argued below, the Department's primary argument on appeal is that *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998) is dispositive and supports its § 1396p(h) "asset" argument. Appellant's Brief, p. 13. Throughout this case the following points have emerged: 1) The Department cites and relies heavily upon a *Jackman* opinion that this Court withdrew. The withdrawn opinion is not Idaho law, has absolutely no

[13] It is a basic principle of statutory construction that the enumeration of exceptions in a statute is construed as an exclusion of all other exceptions. *See e.g., Hines v. Department of Public Aid*, 850 N.E.2d 148, 153 (Illinois 2006).

precedential value and is not binding upon this Court; and 2) The Department relies on *dicta* in the substituted and published *Jackman* decision to bootstrap itself into a position of arguing that somehow the law is settled in this area by the withdrawn *Jackman* opinion[14].

In its November 2, 1998 *Jackman* decision, the opinion clearly notes "Substitute Opinion The Court's Prior Opinion Dated June 16, 1998, Is Hereby Withdrawn." *See* Department Cases, p. 2; R., p. 441. The Internal Rules Of The Idaho Supreme Court, Rule 15(f) states in part:

> (f) Unpublished Opinions of the Court. . . . **If an opinion is not published, it may not be cited as authority or precedent in any court.** (emphasis added).

The June 16, 1998 *Jackman* opinion was never published. The Court withdrew it and issued a substitute opinion. The June 16, 1998 *Jackman* opinion may not be cited as authority or

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[14] The briefing below created some confusion between pre-eligibility transfers and look-back rules with post-eligibility rights. The look back period referred to in 42 U.S.C. § 1396p(c) applies when one spouse applies for Medicaid. **Once one spouse qualifies for Medicaid, any resources belonging to the community or non-recipient spouse are solely the property of that spouse and the non-recipient spouse can do whatever he wants with them. 42 U.S.C. § 1396r-5(c)(4).**
The import of this statute was discussed in a June 29, 1999 letter to Idaho attorney Rod Gere from Robert Reed, Chief of the Medicaid Branch of the HHS Division of Medicaid and State Operations for Region X. This letter was copied to Karl Kurtz, then acting Director of the Idaho Department of Health and Welfare, and stated in part,

> Thus, after the eligibility determination any resources belonging to the community spouse are solely the property of that spouse. That spouse can do whatever he or she wants to with them, **including leaving them, via a will, to particular heirs that do not include the institutionalized spouse**. (emphasis added).

The Department argued that this inquiry had to do with whether the Medicaid spouse was made ineligible by the non-recipient spouse's transfer of assets. While true, that point doesn't undercut the fact that CMS has stated the non-recipient spouse can do whatever they want with these assets post-eligibility, including leave assets to children/heirs via a Last Will & Testament upon death. This directly contradicts the Department's assertion that it has the right to capture those assets in an estate recovery claim. *See also*, April 5, 2000 letter from Ronald Preston, HHS Associate Regional Administrator for Region I stating in part,

> **Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.** (emphasis added)

The above-cited HHS letters are attached hereto for the Court's convenience as **Appendix 4**. Federal law simply does not treat the property of the recipient and that of the non-recipient spouse as the same post-eligibility. Of course, estate recovery only occurs post-eligibility.

precedent in this Court. Yet the Department cited the withdrawn opinion repeatedly before the Magistrate as well as the District Court and continues to rely on the withdrawn opinion[15]. R., p. 123-124,547,675. Appellant's Brief, p. 14, f.n. 5. The withdrawn *Jackman* opinion carries absolutely no weight on the issue before this Court. It certainly in no way establishes law in Idaho with regard to the federal law issue on appeal. Yet the Department would have this Court speculate as to what the *Jackman* Court would have opined had it ruled on the issue at bar, because of reasoning or rationale in an opinion that the Court never published and withdrew.

The Department must continue to rely on the unpublished opinion, even though this is improper, in order to draw the "implication" it alone sees in the published decision. Throughout this case, starting with the magistrate, the Department has consistently ascribed a holding to *Jackman* that the Court simply did not make. The fundamental problem with the Department's reliance on the published *Jackman* decision is that the Court was dealing with a situation that **pre-dated** the OBRA-1993 amendments. This Court in *Jackman* stated repeatedly and was very careful to make sure that its opinion was restricted to the version of federal law applicable to the controversy before it – in other words the decision was applicable only to cases arising **pre**-OBRA 1993. *Jackman* was explicitly restricted to the facts in that case. The Court made this very clear when it stated its holding that, "We conclude that section 56-218(1) of the Idaho Code (I.C.), **as it existed at times applicable to this case**, ..." (emphasis added). *Jackman, supra* at 214.

[15] Despite the fact that the Department tries to explain away its citation to the withdrawn opinion, it continues to improperly rely on that opinion in violation of this Court's internal rule 15(f). Appellant's Brief, p. 14, f.n. 5.

The Court also stated,

> **We conclude that this [the post-OBRA 1993] definition of "assets" is not applicable to the agreement**, which Jackman signed on behalf of Lionel and Hildor on March 8, 1993. **The definition of "assets" contained in the 1993 amendments to the federal statute does not apply** "with respect to assets disposed of on or before the date of the enactment of this Act [Aug. 10, 1993]." Pub. L. 103-66, § 13611(e). Therefore, **it [the post-OBRA 1993 definition of "assets"] does not apply to the agreement and does not allow the Department to recover the balance of Medicaid payments** from Lionel's separate property.

Jackman, supra at 216.

The Department contends that because the Court discussed the OBRA 1993 amendments that this somehow settles the issue. Justice Johnson's statements in *Jackman*, upon which the Department so heavily relies, are simply *dicta* or *dictum*[16]. Justice Johnson's comments on how to interpret the **post**-OBRA amendments in federal law were not involved in nor necessary to the holding in the published *Jackman* decision which was a **pre**-OBRA 1993 case. The Court says as much – repeatedly[17]. The Magistrate also appropriately recognized that *Jackman* does not control this post-OBRA 1993 case and does not support the Department's misapplication of I.C. § 56-218. The magistrate stated,

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[16] "Dicta" is defined as,

> Opinions of a judge which do not embody the resolution or determination of the specific case before the court. **Expressions in the court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent**. (emphasis added)

Dictum is defined as follows:

> The word is generally used as an abbreviated form of *obiter dictum*, . . . **Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.** . . . (emphasis added).

Black's Law Dictionary (6th ed. 1991).

[17] The Department admits as much when it states that, "there was no issue as to property transfers after October 1, 1993" at issue in *Jackman* and the question before the *Jackman* Court "was *not* what Hildor [the Medicaid recipient] owned *at death*." (emphasis added). R., p. 546.

> THE COURT . . . I really have been struggling to deal with the definitions of estate and assets in both the state and federal's schemes. . . . **I perceive the State as saying that *Jackman* [sic] allows the Court to look at any time, any period of time, in which the recipient of benefits had an interest in property. . . . I don't see that *Jackman* [sic] says that. . . . Because I think we've got to look at the published opinion, not the first one. What does that leave us. And I don't think it leaves us much.**
>
> At least that's how it feels to me, that it doesn't necessarily say to me that the State may look to any period of time after 1993 that a Medicaid beneficiary, Medicaid recipient had an interest in property. I don't think it [Jackman] makes that determination. . . . **I don't think it [*Jackman*] makes a determination of where in that period of time the estate may look at the recipient's interest in property**. (emphasis added).

Tr., p. 12, LL. 18 through p. 13, LL. 25.

The District Court agreed stating,

> **The State's reliance on *Jackman* is based largely on the original opinion in that case, which has since been substituted**. The State urges this Court to consider this opinion, arguing that it clearly shows the court's intent to give "assets" a broad interpretation, and that the decision would have been different if the court had been able to apply the statutes in their current form. **The Court does not agree.** The full reasons for issuing a substitute opinion are not ascertainable by simple comparison of a substitute opinion. Given Internal Rule of the Idaho Supreme Court 15(f)'s prohibition against citation of unpublished opinions, **the Court will not speculate about a withdrawn opinion to determine how the clear and unambiguous language of the statutes in question should be interpreted, or to determine the applicability of the preemption doctrine**[18]. (emphasis added).

R., p. 721.

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[18] Most recently another Idaho district court, acting in its appellate capacity, came to the same conclusion. In *Wiggins,* the District Court rejected the Department's argument that *Jackman* decided this issue and stated,

> **While the Supreme Court [in *Jackman*] did talk about the effect of the 1993 amendments in broadening the definition of "assets," that was not necessary to the Court's decision based on its reasoning**. The Court was not presented directly with the question of whether, under the law as it now exists, federal law would trump state community property laws in making separate property liable for debts that could otherwise not be recovered from separate property. (emphasis added).

Id. at 12. In other words, the Department is relying on dictum in the published *Jackman* decision.

No matter how much the Department would like to draw implications or speculate about the *Jackman* decision based on the unpublished opinion, the fact remains –*Jackman* does not control the outcome of this case. This Court should affirm the Magistrate's Order Disallowing Claim, and do so unencumbered by the Department's efforts to shackle the Court's analysis with dicta from the *Jackman* opinion.[19]

H. FEDERAL LAW CONTAINED IN 42 U.S.C. § 1396p(b)(4)(B) IS CLEAR AND UNAMBIGUOUS. THE DEPARTMENT'S CLAIM, BASED ON THE GENERAL DEFINITION OF "ASSETS" IN 42 U.S.C. § 1396p(h)(1), HAS NO MERIT.

As noted above, federal law says nothing about allowing recovery from assets in which the Medicaid recipient does not have an interest at death. The U.S. Solicitor General's brief plainly rejects the Department's argument relying on the definition of "assets" in 42 U.S.C. § 1396p(h)(1) attempting to expand the scope of allowed recovery, stating,

> 2. **Petitioner [State of Minnesota] argues (Pet. 25-28) that the text of the Medicaid Act imposes no limit on permissible recovery from the estate of the Medicaid recipient's surviving spouse, because the Act defines the term "assets" to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. 1396p(h)(1). According to petitioner, "[b]y including resources of both 'the individual' and 'of the individuals spouse' in the meaning of 'assets,' Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B)."** Pet. 27.
>
> **Petitioner is incorrect. Although the general statutory definition of "assets" does encompass resources of both "the individual" (*i.e.*, the Medicaid recipient) and "The individual's spouse," the particular provision of the Medicaid Act at issue here refers specifically to any "assets in which**

[19] Assuming *arguendo* that this Court concluded that the *Jackman* opinion's dicta upon which the Department relies was actually a holding in the case, the Court should still rule in the PR's favor for all the reasons urged by the PR. It is well past time for Idaho law to be brought into line with mandatory federal statutes which require that estate recovery in Idaho be limited to recovery against assets in which the Medicaid recipient had an interest in at death, as clearly defined in federal law.

> ***the individual*** **had any legal title or interest at the time of death." 42 U.S.C. 1396p(b)(4)(B) (emphasis added). Petitioner's argument finds it necessary to rewrite that clause to read "'any * * * assets in which [*either or both the individual and the individual's spouse*] had any legal title or interest.'" Pet. 26 (brackets and asterisk in original) (emphasis added). But this editing does nothing less than make the statute say the opposite of what it says. The plain language of the operative provision of the Act refutes petitioner's readings.**[20]
>
> . . .
>
> 4. **Because Section 1396p(b) leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death, the presumption against preemption does not come into play**, Pet. 28 . . . (emphasis added).

Appendix 3, U.S. Solicitor *amicus* brief, p. 10-12.

The U.S. Solicitor General concluded that 42 U.S.C. § 1396p(b) "leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death." *Id.* at 12. The point could not be more clear – **the Department's argument that the general definition of "assets" contained in § 1396p(h) changes the plain wording in § 1396p(b)(4)(B) is incorrect**. HHS spoke through its legal counsel to the U.S. Supreme Court as to its reading of this federal law. As noted above, a federal agency's reading of federal statutes is entitled to great weight and HHS has extremely broad authority in the Medicaid area. *Chevron and Blumer, supra.*

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[20] (footnote 2 in the original *amicus* brief) In describing the operation of the amended estate-recovery provision, the legislative history of the 1993 amendments also focused on the assets of the individual who had received Medicaid benefits, rather than the resources of both the individual and his or her spouse. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 835 (1993) ("At the option of the State, the estate against [which] * * * recovery is sought may include any real or personal property or other assets in which *the beneficiary* had any legal title or interest at the time of death, including the home.") (emphasis added) (footnote original)

i. Basic Rules Of Statutory Construction Support The Magistrate's Decision.

Applying well-established rules of statutory construction also supports the conclusion that the Department's position is without merit. Subsection 42 U.S.C. § 1396p(b)(4)'s definition of "estate" is specific to "this subsection" meaning subsection (b) of 42 U.S. C. § 1396p. In contrast, subsection 42 U.S.C. § 1396p(h)(1)'s definition of "assets" applies generally to "this section (i.e. all of 42 U.S.C. § 1396p) and is included in the "definitions" section at the end of the statute. When interpreting statutory definitions and provisions, specific definitions take precedence over general definitions[21].

The more specific definition of "estate" under (b)(4) supplants or takes precedence over the broader, more general definition of assets in (h)(1), thereby imposing limits on what is recoverable in Medicaid recovery actions. The Department's interpretation attempts to reverse this, and superimpose the general definition of "assets" improperly upon the specific definition of "estate" that applies in 42 U.S. C. § 1396p(b)(4)(B). The Solicitor General explicitly rejected this flawed statutory analysis[22]. The Department's reliance on the definition of "asset" in § 1396p(h) to supplant and in essence re-write the specific definition of the word "estate" in § 1396p(b)(4) is simply without merit.

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[21] *See e.g., In re Drainage District No. 3*, 40 Idaho 549, 553, 235 P.2d 895 (1925), citing Sutherland on Statutory Construction, sec. 387.

[22] The application of a more general definition of "assets" makes sense in other subsections in § 1396p that do not contain a specific definition of an applicable term used in the particular subsection itself, as does § 1396p(b)(4)'s definition of "estate." For instance, 42 U.S.C. § 1396p(c), entitled "Taking into account certain transfers of assets" contains the Medicaid asset transfer penalty rule that applies in eligibility determinations. The application of the general definition of the word "asset" in § 1396p(h) makes sense when applied to § 1396p(c)'s use of that term for two reasons: 1) an asset transfer penalty applies when determining Medicaid eligibility no matter which spouse transferred the asset; and 2) § 1396p(c) does not contain language defining a term used in that particular subsection as does § 1396p(b)(4) definition of the term "estate".

ii. Wirtz Is An Anomoly That Should Not Be Followed In Idaho. Its Unpersuasive Reasoning Has Been Roundly Rejected.

The Department cites *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000) indicating that the North Dakota Supreme Court "relied on this same reasoning" to uphold a recovery claim. Appellant's Brief, p. 14. *Jackman* cannot be cited for the proposition the Department would like to cite it for (i.e. the unpublished opinion), so that leaves *Wirtz* standing alone.

The Department does not assert the same position that the *Wirtz* court relied upon to justify its decision. The *Wirtz* court did not rely on the definition of "assets" in § 1396p(h). The *Wirtz* court reached the result it sought on a finding that the words "interest" and "other arrangement" in § 1396p(b)(4)(B) were ambiguous, allowing it to "resort to extrinsic aids to ascertain the legislative intent" and thereby rewrite the statutory language. *Wirtz*, *supra* at 885.

Recognizing the clear weight of cogent, well-reasoned authority, the Magistrate rejected the untenable "asset" definition argument and the *Wirtz* reasoning. The Magistrate stated,

> To paraphrase the Department's argument, it may recover from George's estate because Idaho Code 56-218(1) allows recovery from the estate of a recipient's spouse; 42 U.S.C. 1396p(b)(4) includes the word "assets" in its definition of "estate" and 42 U.S.C. 1396p(h)(1) says "assets" includes property that a person transferred to her spouse. **The court cannot accept this interpretation**.
>
> The reasoning urged by the Department is similar to that presented in *Estate of Wirtz*, 607 N.W.2d 882 (N.Dakota 2000). Clarence Wirtz had received Medicaid benefits and North Dakota sought to recover the payments from the estate of Verna Witz [sic], Clarence's wife. The Wirtz court analyzed the federal statutory definitions of "estate" and "asset" as quoted above and held that "...any assets conveyed by Clarence Wirtz to Verna Wirtz before Clarence Wirtz's death are subject to the department's recovery claim." Id. at 886. This ruling depends, however, on an awkward interpretation of the term "other arrangement" in 42 U.S.C. 1396p(b)(4)(B). The North Dakota court in *Wirtz* interpreted the "other arrangement" language independently from the rest of the section. The bulk of

> the section refers to transfers of property that occur in an automatic fashion on the death of the owner, such as joint tenancies, survivorship transfers and life estates. It would have been a drafter's nightmare to list every imaginable transfer of property of this type. Consequently, the more natural interpretation in the context of the surrounding language is that "other arrangement" is meant to include transfers of a similar, automatic nature not any possible transfer. (emphasis original).

R., p. 508-509. The District Court also rejected the *Wirtz* court's reasoning, stating, "The Court first considered the plain language contained in the provisions, which it found unambiguous." (emphasis added). R., p. 720.

The Magistrate went on to note that the Minnesota Supreme Court in *Barg, supra* at 71, provided a "more reasonable interpretation of the federal statutory language." *Id.* The *Barg* Court thoroughly discussed and rejected *Wirtz* stating,

> **. . . Indeed, of the courts that have interpreted federal law to allow direct claims against the estate of a surviving spouse, only one has construed that authority to extend to assets that were transferred before the death of the Medicaid recipient, and that court relied on language from the 1993 amendments to support that extension.** *See In re Estate of Wirtz,* 607 N.W.2d 882, 885-86 (N.D.2000). . . .
>
> Other courts that have recognized authority to recover from a source other than the Medicaid recipient's estate have construed that authority to reach only assets in which the Medicaid recipient had an interest at the time of her death, that is, assets which were part of the recipient's estate as defined by traditional state probate law or included in the estate under an expanded definition allowed by the 1993 amendments to federal law. *See Bucholtz,* 114 F.3d at 925-27 (limiting recovery to assets that were part of recipient's estate as defined by state probate law); *Kizer,* 887 F.2d at 1006 (same); ***Jackman,* 970 P.2d at 8-10 (holding that recovery from surviving spouse's estate allowed by Idaho Medicaid recovery statute is limited by federal law to assets that were part of the Medicaid recipient's estate as defined under state probate law**); *Thompson,* 586 N.W.2d at 851 n. 3 (recognizing that "expansive definition of `estate' in [section] 1396p(b)(4) extends only to assets in which the medical assistance benefits recipient `had any legal title or interest in at the time of death'"); *see also In re*

Estate of Smith, No. M2005-01410-COA-R3-CV, 2006 WL 3114250 at *4 (Tenn.Ct.App. Nov.1, 2006) (explaining that courts that have allowed recovery against estates of surviving spouses have required that recipient had interest in assets at time of death). . . .

As noted above, the only decision to deviate from this limiting principle requiring an interest at the time of death is *Wirtz*. . . . Concluding that the words "interest" and "other arrangement" are ambiguous, the court relied on the Congressional intent it perceived "to allow states a wide latitude in seeking Medicaid benefit recoveries." *Id.* at 885-86. . . .

We cannot agree that the "other arrangement" language in the 1993 amendment is ambiguous in the sense implied in *Wirtz*. The plain meaning of "other arrangement," read in the context of section 1396p(b)(4), is arrangements other than those expressly listed that also convey assets at the time of the Medicaid recipient's death. . . .

We conclude that there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death. As explained above, the rationale for finding authority to recover from a surviving spouse's estate at all emanates from the authority granted in the federal law to recover from the "estate" of the Medicaid recipient. Property transferred prior to death would not be part of the recipient's estate. Further, as recognized by every decision except *Wirtz*, to the extent the 1993 amendments allow states to expand the definition of "estate" for Medicaid recovery purposes, the language of the federal law clearly limits that expansion to assets in which the recipient had an interest at the time of her death. Accordingly, we hold that Minn.Stat. § 256B.15, subd. 2, is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly-owned property *at any time* during the marriage. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death. (Emphasis added)

Barg, supra at 68-71[23]. No court addressing a post-OBRA 1993 estate recovery claim has accepted and followed the *Wirtz* rationale. The *Wirtz* court's reasoning is

[23] *See also, In re Estate of Smith,* (Tenn.App. 2006) ("We must respectfully disagree with the rationale of *Wirtz* since under 42 U.S.C. § 1396p(b)(4)(B), in order to be potentially recoverable, an asset must be one in which the

indefensible and this Court distinguishes itself by joining the chorus of other decisions that have rejected it.

iii. Neither I.C. § 56-218 Nor The Department's Regulations Change Community Property Law In Idaho.

In prior briefing, the Department has tried to prop up *Wirtz* by arguing that the Solicitor General mentioned that *Wirtz* may not be inconsistent with *Barg* because the *Wirtz* decision may be due to "different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse." R., p. 680; Solicitor General *amicus* brief, *supra* at p. 14. Federal law limits the scope of estate recovery to assets in which the Medicaid recipient has an interest in at death. State law then enters into the analysis to determine whether the Medicaid recipient retained an interest in any assets at death.

Idaho law stands for the proposition that when someone completely divests themselves of property during their lifetime, they do not retain any legal title or interest in that property at the time of their death. The Magistrate so held when he stated,

> . . . When making a claim against the estate of a Medicaid recipient's spouse, the Department may only recover against property in which the recipient spouse had an interest at the time of her death. **Martha Perry conveyed all of her interest in the Tendoy home during her lifetime. There was no joint tenancy, right of survivorship or "other arrangement" that would have conveyed any interest**

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recipient had a 'legal title or interest at the time of death.'").

> **The North Dakota Supreme Court is the only court to deviate from this limiting principle requiring an interest at the time of death.** *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. Sup. Ct. 2000), held that any assets conveyed by the Medicaid recipient to his or her spouse before the recipient's death were subject to recovery from the surviving spouse's estate, **relying on Congressional intent it perceived** "to allow states wide latitude in seeking Medicaid benefit recoveries." *Id.* at 885-86. (emphasis added).

32 Mental & Physical Disability L. Rep. 498, 515 (ABA, July/August 2008).

in this property to Martha at George Perry's death. The Department may not recover Medicaid benefits paid to Martha from the proceeds from the sale of this property. (emphasis added).

R., p. 510. The District Court agreed stating,

> The State disputes the magistrate and personal representative's interpretation, which places emphasis on the phrases limiting the property and assets of the recipient of benefits held "at the time of death." The magistrate found that this definition of "estate" did not permit a state agency to look back and recover property interests that the recipient divested prior to death. **This Court agrees.** The language and definition of "estate" is broad, and includes all interests, including any which may have automatically transferred upon the death of the recipient. **However, it goes without saying that where a recipient has long ago been divested of any particular interest, it would not fall within that individual's estate. Moreover, nothing in this provision [42 U.S.C. § 1396p(b)(4)] seeks to preserve interests that were divested well before death, something which the drafters were clearly able to articulate in those provisions dealing with Medicaid eligibility requirements**[24].

R., p. 711-712.

In the proceedings below the Department argued that I.C. § 56-218(4) actually changed marital property law in Idaho. R., p. 688. In *Wiggins*, *supra*, the district court expressly rejected this same argument stating,

> It appears from a plain reading of this section [I.C. § 56-218(4)] that the recipient's estate includes not only property in which the recipient had a legal interest but also property which passed by operation of law to someone else at the time of the recipient's death. **Neither of those circumstances would include**

[24] The district court also correctly observed,

> Indeed, when addressing the eligibility requirements for assistance, under § 1396p(c)(1)(A), the drafters made those who transfer property "for less than fair market value" ineligible for assistance. The State argues it would be absurd to prohibit the recipient and/or recipient's spouse from disposing of assets below market value in eligibility determinations, while allowing assets to be transferred at no cost post-eligibility for purposes of avoiding reimbursement or recovery payments in probate. However, § 1396p(c)(1)(A) deals specifically with eligibility, not recovery. Had the drafters sought to include this same provision in the area of probate and recovery matters, they easily could have made such a distinction. (emphasis added). *Id.*

> **property which the recipient had sold, given away or transferred prior to death. . .**
>
> **Part of the difficulty is that <u>the Department's interpretation of what should be included in the recipient's estate ignores Idaho community property law</u>** and does not address the impact of having separate property in the recipient spouse's estate. **Indeed, <u>in its brief, the Department asserts that I.C. § 56-218(1) "effectively alters marital property law in Idaho when it comes to the property of Medicaid recipients and their spouses</u>." <u>There is no indication in this statute that the Idaho legislature intended such a sweeping change by simply authorizing the State to assert a claim against a recipient's spouse's estate</u>.**[25] (emphasis added).

Appendix 2, p. 6-7. The Department is asking this Court to change basic principles of Idaho community property law to permit the claim it makes against George's Estate. There is no legal justification for this result.

I. THE DEPARTMENT'S POLICY ARGUMENTS ARE IRRELEVANT.

The Department has repeatedly invited the lower courts to engage in a policy debate on the intent behind the federal law, and the PR anticipates it will do so again in its Reply Brief. R, pgs. 531-532;534-535;541;666-668;671-672;676-677;689. The Department's opinion of public policy, Congressional intent, or the purpose of the Medicaid statutes is irrelevant. This Court need not, indeed may not, engage in policy interpretations when faced with clear, unambiguous federal statutes.

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[25] In *Wiggins*, the Department also "admitted that it cannot pursue property that has always been the separate property of the recipient's spouse (even though this contradicts the Department's argument that I.C. § 56-218 broadly allows recovery against both spouses' estates)." *Id.* at 8. The Department then raised IDAPA 16.03.09.900.20 and 16.03.09.900.24 as justification for its position, just as it does in the case at bar. The District Court was not persuaded, stating, "At oral argument the Department was unable to justify the reasoning or logic to support its position that some separate property of the recipient's spouse is liable to the State while other separate property is not (apart from the Rule mentioned above)." *Id.* at 9.

> Analysis of a statute or regulation always begins with the literal language of the enactment. *Friends of Farm to Market v. Valley County,* 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) (citations omitted). Our Supreme Court has established that it will not look to the legislative intent of a regulation where the express written language of the regulation is unambiguous. *Friends of Farm to Market,* 137 Idaho at 197, 46 P.3d at 14 (citing *Lawless v. Davis,* 98 Idaho 175, 560 P.2d 497 (1977)). "Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language." *Id.* If the language is clear and unambiguous, then a court may not interpret the language to include an unwritten legislative intent.

Stafford, supra at 464-465. As Minnesota's Supreme Court noted in discussing the same types of policy arguments made by the Department in this case, "[that] argument would take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language." *Barg, supra* at 69.

J. THIS COURT SHOULD AFFIRM THE MAGISTRATE'S HOLDING THAT GEORGE, AS HIS WIFE'S AGENT, HAD LEGAL AUTHORITY TO ENGAGE IN THE REAL PROPERTY TRANSFER AT ISSUE ON HER BEHALF[26].

i. The Conveyance At Issue Was "For Value Received." The Deed Speaks For Itself.

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[26] The power of attorney issue discussed in this section is not determinative of the estate recovery/federal law preemption issues raised in this appeal. The Department argues that "if Martha still had an interest in the property at the time of her death, then the second issue, relating to preemption, is never reached." Appellant's Brief, p. 5. This is incorrect. No matter how the Court rules on the power of attorney issue, it still must reach the PR's argument that the Department's claim in this case is impermissibly broad and that Idaho estate recovery law conflicts with federal law and is preempted by federal law.

It is not disputed that Martha owned the couple's home as her separate property prior to her marriage to George. R., p. 133. It is also undisputed that on November 18, 2002, Martha executed a deed conveying a ½ interest in the home to her husband George. R., p. 134-135. The Department has never challenged the legal efficacy of this transfer. On July 31, 2006, Martha conveyed her remaining interest in the home to George, at which time the home became George's separate property. I.C. §§ 32-903, 32-906. The Department challenges George's authority to engage in this conveyance for Martha.

The legal effect of a finding that George did not have the authority to convey Martha's remaining interest in the home to himself would be that Martha retained that interest. Yet the Department's claim seeks to recover against the *entire* value of the house sale proceeds, not just a ½ interest in those proceeds. This claim exceeds what Martha owned or had title to at her death, even *assuming arguendo* that this Court held that George did not have the authority to engage in the transfer at issue. Therefore, no matter how the Court rules on the power of attorney issue, it must still resolve the estate recovery/federal law preemption issues.

Both the Magistrate and District Court found that the among the powers sufficient to authorize George to act for Martha in signing the July 31, 2006 was paragraph A, which included expansive real property powers. Paragraph (A) entitled "Real property transactions" authorized George to deal with her real property,

> on such terms and conditions . . . as my Agent shall deem proper; and to . . . convey . . . and in any way or manner deal with all or any part of any interest in real property whatsoever, including specifically, but without limitation, real property lying and being situated in the State of Idaho, under such terms and conditions . . . as my Agent shall deem proper.

The Magistrate ruled from the bench on the power of attorney issue stating,

> The power of attorney issue was – is interesting to me and . . . **when everything – all of the language in that power of attorney is considered, it's so – <u>the intent that you just can't get around is that document was entitled to give George Perry as broad of authority as possible</u>, it seems to me, <u>including the right to deal with interest in real property</u>.**
>
> **So I'm going to make a determination for purposes of this case that that is a valid power of attorney for purposes of dealing with – including giving Martha Perry's interest in that property.**
>
> So I'm going to decide that question for purposes of this case. (emphasis added)

Tr., p. 11, LL. 8-25; p. 12, LL. 1-11; Magistrate Court Tr., p. 4. The District Court concluded,

> **Paragraph A of the power of attorney allowed George to convey Martha's interests in real property as he deemed proper**. The power of attorney was executed in 2005 prior to the enactment of the current Uniform Power of Attorney Act, Idaho Code § 15-12-101 *et seq.*, in 2008. The present act requires express authority to make gifts, but it is not applicable here. **No authority has been cited requiring such language prior to the adoption of the act.** (emphasis added)

R., p. 709.

For the first time in its briefing before this Court, the Department cites an A.L.R. treatise for the general proposition that consideration must inure to the principal when general real property powers are utilized by an agent to convey property. Appellant's Brief, p. 8. This caused PR's counsel to review once again the deed's language. The July 31, 2006 deed states in pertinent part,

> FOR VALUE RECEIVED, Martha Jean Perry, Grantor, does hereby convey, release, remise and forever quitclaim until George D. Perry, whose address is 2104 Tendoy Drive, Boise, ID 83705, the following described premises, to-wit:.... This deed in intended to convey to the Grantee all right, title, and interest of the Grantor in and to said property, now owned or hereinafter acquired. (emphasis original).

R., p. 99. This was not a gift deed. The word "gift" was not used at all. To the contrary, this was a conveyance for consideration, as plainly stated on the face of the deed.

At the beginning of the hearing before the magistrate, Judge Bieter inquired as to whether he could decide the matter on the evidence submitted. Both counsel stipulated that no evidentiary hearing was necessary and the matter could be ruled upon based on the documents submitted into evidence. The parties proceeded on that basis. The Department raised no objection to admission of the July 31, 2006 deed. Tr., p. 3, LL. 3 – p. 5, LL. 18. Magistrate Court Tr., p. 2.

The Department has consistently challenged George's authority to sign the deed for Martha, *not the deed itself.* The Department has never raised any issue with regard to the deed's validity or delivery. The Department has always contended the conveyance was a gift and that Martha's power of attorney was ineffective to allow George to sign the deed *because* the power of attorney did not contain what the Department considered to be adequate gifting authority.

In *Bliss v. Bliss*, 127 Idaho 170, 174, 898 P.2d 1081 (1995), the Court found the deed language "ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION" to be unambiguous. The Court cited *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255 (1989) for the holding that where a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself. The deed at issue in *Hall* actually contained the exact same language as does the July 31, 2006 deed at issue here. The *Hall* Court stated, "Where, as here, the consideration clause clearly recites that the transfer was made "**For Value Received**," parol evidence is not admissible to contradict the deed by attempting to show the transfer was in part a "gift" rather than "for value." (emphasis added). *Id.*

As noted above, the Department stipulated to the admission of the deed and did not raise any challenge to the consideration clause in the deed or seek to introduce evidence for any purpose on this issue. This case is unlike *Barrett v. Barrett*, 149 Idaho 21, 232 P.3d 799 (2010), or the cases cited therein, where the Court held that evidence beyond a deed was admissible to show or disprove transmutation. The Department conceded the home was George's separate property if the conveyance was effective. Tr., p. 11, LL. 22-25. The consideration clause, as in *Hall*, is clear and unambiguous. The deed speaks for itself. The Department's claim that Martha's power of attorney was inadequate because it lacked gifting powers fails entirely because the deed itself establishes that the conveyance was "for value received" and thus not a gift at all[27]. The fact that the deed language -- never contested by either party -- establishes that

[27] In briefing before the district court, the PR argued that the Department was precluded from raising a new issue on appeal because the Department relied on a statute that it had not relied on below. R., p. 598. The Department responded,

the conveyance was "for value received" and was not a gift at all is relevant to the Court's consideration of whether the provisions in the power of attorney are legally adequate to empower George to convey Martha's remaining interest in the home to himself.

ii. Martha's Power Of Attorney Was More Than Sufficient To Allow George To Transfer Martha's Interest In The Property To Himself.

This Court should find that Martha's power of attorney was more than adequate. Martha's power of attorney is incredibly comprehensive. It starts out stating in all capital letters that the "powers granted by this document are broad and sweeping." The power of attorney then goes into great detail explaining a very wide variety of powers that are granted to George, as agent. Paragraph (A) entitled "Real property transactions" is cited above. The authority granted under this paragraph also includes the authority to "cancel" notes, mortgages, security interest, or deeds to secure debt, which is equivalent to "giving away" assets of the principal, should that even be an issue.

Martha's power of attorney also includes, under paragraph (H), entitled "Estate, trust, and other beneficiary transactions" the power "**To . . . <u>exercise</u> . . . <u>any</u> . . . <u>gift</u> . . . for the**

> The personal representative is confusing "issue" with "authorities." The issue has always been the same: Whether Martha's property conveyed by George to himself is subject to recovery. **The Department is merely citing additional authorities relating to this issue**. If additional authorities could not be cited much of the Respondent's Brief would have to be excluded. (emphasis added)

R., p. 686.

The Department's analysis is apt and applies to the July 31, 2006 deed. The issue remains the same – whether Martha's power of attorney gave George the requisite authority to convey Martha's interest in the home to himself. The PR is simply presenting additional legal authority which supports the legal conclusion that the deed was for consideration and not a gift. The deed itself was properly admitted before the magistrate and has been in evidence throughout this case.

principal."[28] Martha *expressly* authorized George as her agent to make gifts on her behalf. By including the qualifier that George, as agent, may exercise "*any* gift" on her behalf, Martha broadened that power to authorize George to make gifts to any person, including himself. The Magistrate held that although this language was not the "clearest kind of authority" he held that the gifting language in paragraph H "certainly can be read that way." Tr., p. 11, LL. 12-13; Magistrate Court Tr., p. 4. Martha's power of attorney satisfied I.C. § 32-912, if that statute is even relevant (see discussion below).[29]

The gifting authority that Martha gave to George must also be read in conjunction with the other powers Martha granted to her husband, specifically the power to exercise *all powers with respect to Medicaid"* that she could exercise. Paragraph (K) entitled, "**Benefits from** Social Security, Medicare, **Medicaid**, or other governmental programs, or military service" authorizes Martha's husband as her agent

> "To . . . file . . . claims to any benefit or assistance under any federal, state, local or foreign statute; **and in general, exercise all powers with respect to . . . government benefits, including but not limited to Medicare and Medicaid, which the principal could exercise if present and under no disability**. (emphasis added).

Conveying the Medicaid spouse's interest in the couple's home to the community spouse is expressly sanctioned by federal law and typical in cases of married couples where one spouse

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[28] The full sentence that contains this language states, "**To** accept, receipt for, **exercise**, release, reject, renounce, assign, disclaim, demand, sue for, claim and recover **any** legacy, bequest, devise, **gift** or other property interest or payment due or payable to or **for the principal**." (emphasis added).

[29] The fact that a title company required the PR to sign off on the closing statement for Martha is not equivalent to a legal finding that Martha's power of attorney was somehow deficient, as the Department implies. Appellant's Brief, p. 11. That signature requirement is simply the title insurer covering its bases because the couple was married at the time of the closing and Martha was still alive. It is standard procedure for a title insurer to have both spouses sign off as a liability avoidance precaution.

is qualifying for Medicaid benefits. Martha's power of attorney not only contemplated that her agent/husband could make such an interspousal transfer, it expressly authorized it. The combination of the comprehensive power to "exercise any gift" and the comprehensive power to "exercise all powers with respect to ... Medicaid" and "real property transactions" expressly establishes that George acted well within his authority as Martha's agent in executing the deed that the Department challenges.

The Department cites a number of cases to support its argument that Martha's power of attorney was somehow insufficient. Appellant's Brief, p. 7-9. All of these cases are easily distinguishable from the instant case. In none of those cases did the power of attorney contain the specific gifting and Medicaid planning language that Martha's power of attorney contains. In none of those cases did the power of attorney contain any gifting language whatsoever. In none of those cases was an interspousal transfer at issue. In none of those cases was Medicaid at issue. In addition, every case the Department cites involved agents who were not spouses. In the Department's cited cases, the non-spouse agents were conveying assets to themselves or to other third parties, often in contravention of the principal's estate distribution plan or somehow in contravention to what the principal would have intended.

In this case, Martha's agent was her husband, conveying Martha's remaining interest in a home in which he was residing, to himself, while his wife was in a nursing home. Martha had already taken action to put George's name on the title herself, indicating her intent he have ownership in the home. George was the natural object of Martha's bounty.

The interspousal transfer makes sense and was contemplated by the power of attorney Martha put in place specifically to allow such actions. There simply are no concerns present in this case regarding financial abuse of the principal, negation of the principal's estate plan or fraud on the principal as was at issue in the authorities the Department relies upon.

"Powers of attorney are to be construed in accordance with the rules of interpretation of written instruments generally. . . ."[30] In construing a written instrument, a court must consider it as a whole and give meaning to all provisions of the writing to the extent possible.[31] "The intention of the donor or grantor is to be gathered from the instrument of creation."[32] Reading Martha's power of attorney in its entirety, one is struck by the comprehensiveness of the document. In addition to the introductory language indicating that the powers conveyed to George are broad and all-encompassing, the powers under each paragraph provide great detail emphasizing and underscoring that conclusion[33].

iii. Martha's Power Of Attorney Met The Requirements Of I.C. § 15-5-501 *et seq.*

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[30] 3 Am.Jur.2d Agency § 30, at 533-34 (1986).

[31] *Selkirk Seed Co. v. State Insurance Fund, 135 Idaho 434, 437, 18 P.3d 956 (2000), citing Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.,* 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

[32] 49 C.J. §§ 34, 40. See also 72 C.J.S. Powers § 22 (1951)

[33] Paragraph (B) entitled "Tangible personal property transactions" includes the power to,

> *in any way or manner deal with all or any part of any real* or personal *property whatsoever,* tangible or intangible, *or any interest therein,* that I own at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, *as my Agent shall deem proper.*" (emphasis added).

Paragraph (H), discussed above, also includes language granting the agent power to ". . . in general, *exercise all powers* with respect to estates and trusts *which the principal could exercise* if present and under no disability." The other paragraphs in Martha's power of attorney consistently imbue George with authority to act with total and absolute discretion. The Department's counsel actually agreed with this conclusion when he stated at the hearing before the magistrate, ". . . this is a very comprehensive power of attorney." Tr., p. 7, LL. 5-6; Magistrate Court Tr., p. 3.

I.C. § 15-5-501 *et seq.* was in effect at the time Martha signed the power of attorney and governs that document. I.C. § 15-5-502 stated in pertinent part,

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and . . . bind the principal and his successors in interest, as if the principal were competent and not disabled.

Martha's power of attorney meets all of the requirements of I.C. § 15-5-501. I.C. § 15-5-501 does not mandate that Martha was required to use any specific language or "terms of art" in order to imbue her spouse/agent with the requisite authority to make the interspousal transfer at issue[34]. Yet as discussed above, the power of attorney does contain such language and is completely sufficient under the law then in effect to allow George to sign the deed for Martha.

iv. The Department's I.C. § 32-912 Argument Is Without Merit.

I.C. § 32-906(2) entitled, "Community Property – Income From Separate and Community Property – Conveyance Between Spouses", states in pertinent part,

> **Property conveyed by one spouse to the other** shall be presumed to be the sole and separate estate of the grantee **and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions of section 32-912, Idaho Code**; . . .

I.C. § 32-912 "evinces a legislative policy of protecting community real property from creditors, unless both spouses agree in writing to incur the debt."[35] I.C. § 32-912 is not designed to address

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[34] The district court agreed stating,

> Paragraph A of the power of attorney allowed George to convey Martha's interests in real property as he deemed proper. The power of attorney was executed in 2005 prior to the enactment of the current Uniform Power of Attorney Act, Idaho Code § 15-12-101 *et seq.*, in 2008. The present act requires express authority to make gifts, but it is not applicable here. **No authority has been cited requiring such language prior to the adoption of the act.** (emphasis added). R., p. 709.

[35] *Lowry v. Ireland Bank*, 116 Idaho 708, 713, 779 P.2d 22 (Ct. App. 1989)

interspousal transfers. Pursuant to I.C. § 32-906(2), George signing the deed as agent for Martha was all that was required, *notwithstanding* I.C. § 32-912[36].

v. The Magistrate Made Findings of Fact On The Power Of Attorney Issue Which Support The Legal Conclusion That The Power of Attorney Was Sufficient As A Matter Of Law.

The Department argues that "the Magistrate's discussion of this issue . . . is confined to a footnote."[37] Appellant's Brief, p. 5. The Magistrate's legal conclusion as stated in the Order Disallowing Claim was supported by explicit findings of fact made at the hearing. There is no prohibition against a magistrate making oral findings of fact[38]. The Magistrate's findings are cited above and found at Tr., p. 11, LL. 8-25; p. 12, LL. 1-11; Magistrate Court Tr., p. 4.

The Magistrate clearly ruled not only that paragraph H in the power of attorney was sufficient, but also that the comprehensive nature of the document supported a conclusion that Martha's power of attorney gave George sufficient authority to legally effectuate the interspousal transfer. The Magistrate found as a matter of fact that Martha intended to give George the necessary authority in the power of attorney to transfer the property to himself and found that the power of attorney was sufficient, as a matter of law, to allow George the authority to make the interspousal transfer at issue. The district court affirmed this ruling and so should this Court.

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[36] Throughout this proceeding the PR has asserted that an alternative ground to sustain Martha's power of attorney applied in this case -- common law interspousal agency. The PR reiterates that argument based on *Lowry v. Ireland Bank*, 116 Idaho 708, 713, 779 P.2d 22 (Ct. App. 1989), wherein this Court stated that "an agency may be . . . inferred from the circumstances and conduct of the parties." citing *Noble,* 91 Idaho at 368, 421 P.2d at 448 (1966) (existence of the wife's agency was a question of fact to be determined by the finder of the facts from the husband's and wife's dealings, circumstances, and conduct). Martha's actions in putting the power of attorney in place, the comprehensive language it contains, and the Magistrate's factual findings (discussed below), supports this Court affirming the interspousal conveyance based on the alternative ground of common law interspousal agency.

[37] This same argument was made below and rebutted below. The Department once again ignores what occurred at the hearing. The District Court also discussed this same point in her Order. R., p. 708.

[38] *See e.g., State v. Revenaugh*, 133 Idaho 774, 776, 992 P.2d 769 (1999)

K. THE PERSONAL REPRESENTATIVE IS ENTITLED TO ATTORNEY FEES ON APPEAL

Pursuant to I.A.R. 35(b)(5) and I.C. § 12-117, the PR claims attorney fees on appeal. The Department's appeal lacks any reasonable basis in fact or in law. Neither federal law, nor I.C. § 56-218(4)(b), which mirrors federal law, permits the Department's claim against property in which the Medicaid recipient has no title or interest at the time of her death. The plain, unambiguous language of these statutes supports this conclusion. If this was not enough, the Court's decision *In re: Barg*, decided July of 2008, and the U.S. Solicitor General's opinion issued May of 2009, clearly put the Department on notice that the type of claim made in this case was impermissibly broad and violated federal law. The Department has chosen to pursue this appeal by asserting an erroneous interpretation of clear, unambiguous federal and state statutory language, thereby justifying an award to the Estate of attorney fees on appeal.

CONCLUSION

For all the foregoing reasons, the Personal Representative respectfully requests that the Court affirm the Magistrate's Order Disallowing Claim in its entirety and award the Estate attorney fees on appeal.

DATED this 19th day of September, 2011.

PETER C. SISSON
Attorney for Personal Representative
Estate of George D. Perry

Appendix 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

MAGISTRATE DIVISION

IN THE MATTER OF THE ESTATE OF	)	
	)	Case No. CV 2009-1926
	)	
	)	MEMORANDUM DECISION
Vivian M. Wiggins and	)	DENYING PETITIONER'S CLAIM
Emerson Wiggins	)	AGAINST THE ESTATE
Deceased.	)	

Hearing on the Department of Health & Welfare's petition for allowance of a claim against the estate of Vivian M. Wiggins and Emerson D. Wiggins was heard on the 3rd day of February 2010. Corey Cortwright appeared on behalf of the claimant, the Department of Health & Welfare. The personal representative Lynn Wiggins appeared and was represented by R. Brad Masingill.

Background

A joint estate was opened May 21, 2009, pursuant to Idaho Code 15-3-111. On November 23, 2009 the Department of Health & Welfare filed a claim (pursuant to Idaho Code 15-3-804) against the estate for medical assistance paid on behalf of the decedent Vivian M. Wiggins in the amount of $264,674.45 made pursuant to Idaho Code 56-218.

The personal representative filed a Notice of Disallowance of the claim pursuant to Idaho Code 15-3-806 on November 30, 2009. The claimant filed a Petition for Allowance of Claim pursuant to Idaho Code 15-3-806 on December 1, 2009.

The parties stipulated to the following facts:

1. The Department of Health & Welfare treated Vivian Wiggins and Emerson Wiggins as though they had a Marriage Settlement Agreement (hereinafter MSA) which divided their assets.
2. The MSA transmutted Vivian Wiggins and Emerson Wiggin's community property to separate property.
3. Although no executed copy or original MSA was presented to the court, the parties agreed that one was executed in 2002.
4. The first application for Medicaid Assistance took place in 2002 and the second occurred August 27, 2003.
5. Unless the MSA had been executed, Vivian Wiggins would not have been eligible for Medicaid Benefits.
6. Plaintiff's Exhibits A through G were admitted; they support the amount claimed by the Department $264,674.45 that was paid on behalf of Vivian Wiggins and has not been recovered; and, that a Notice of a Statutory Claim regarding the Estate of Vivian Wiggins was sent to the Personal Representative on March 5, 2009 (Plaintiff's Exhibit B).

The court further finds based on the pleadings that Vivian and Emerson Wiggins were married at the time of Vivian's death. Vivian M Wiggins died on the 30th day of January 2009. Emerson Dale Wiggins died on February 9, 2009.

The personal representative did not contest the amount of the claim or that the Medicaid funds were expended for the care of Vivian Wiggins.

The assets in the joint estate were the separate property of Emerson Wiggins.

The Department did not challenge the validity of the MSA, even though no original or copy of the original was delivered to the court and no proof was made that the MSA complied with Idaho Code sections 32-916 et. Seq. The Department has not brought any action in the district court to challenge the MSA.

Issue

May the Department recover Medicaid benefits paid for Vivian's care from the separate property of her husband, Emerson?

Idaho Code 56-218 provides for the recovery of Medicaid benefits from the estates of deceased Medicaid recipients and their spouses. Idaho Code 56-218 provides;

> (1) **Recovery of Certain Medicaid Assistance –** (1) Except where exempted or waived in accordance with federal law, medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the individual received such assistance, may be recovered from the individuals estate, and the estate of the spouse, if any, for such aid paid to either or both:
> ....

The Department argues that the legal basis for its claim against Emerson's separate property is *Idaho Department of Health and Welfare v. Jackman* 132 Idaho 213 (1998). That case parallels this case factually. *Jackman*'s holding is that the Department is not limited to the estate of the recipient for recovery of Medicaid benefits, but may

recover amounts from the estate of the recipient's spouse. The Idaho Supreme Court held that : (1) "if the estate of the individual who received Medicaid assistance is inadequate to repay the full amount of the assistance received, the Department can recover the balance from the estate of the surviving spouse, but (2) federal law, *as in effect when recipient and her husband entered into marital settlement agreement* transmitting most of recipient's and husband's community property into separate property of husband, limited the Department to recovering any community property recipient and husband may have accumulated after the agreement.

In this matter the personal representative for the estate denied the claim because the claim to recover for benefits paid on behalf of Vivian Wiggins was made against property which pursuant to the MSA would be the separate property of Emerson Wiggins.

The Department argues that recovery against the separate property of Emerson should be allowed because the MSA between Emerson and Vivian occurred in 2002 after the law applicable in *Jackman* was amended to include a more expansive definition of "estate" and "asset". In *Jackman* the parties entered into a MSA in April of 1993 and the Federal Law was amended in October of 1993 (OBRA 93).

The Department's claim relies on an interpretation of the definition of "estate" and "assets" found in Idaho and federal statutes amended in October of 1993. 42 U.S.C. 1396p(b)(4) provides:

> For purposes of this subsection, the term "estate", with respect to a deceased individual-

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State ... any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living, or other arrangement. The term "asset" is defined in 42 U.S.C. 1396(h):

(1) The term "asset", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—

(A) by the individual or such individual's spouse,...

The Department argues that it doesn't matter whether the property is Emerson's separate property or not because the Department may under these definitions recover against any property which had been the couple's community property at any time after October 1, 1993;

20. Limitations on Estate Claims. – Limits on the Department's claim against the assets of a deceased participant or spouse are subject to Sections 56-218 and 56-218A, Idaho Code. A claim against the estate of a spouse of a participant is limited to the value of the assets of the estate that had been, at any time after October1, 1993, community property, or the deceased participant's share of the separate property, and jointly owned property. ...IDAPA 16.03.09.900.20.

The Department points to the language in 42 U.S.C. 1396p(b)(4)(B) as the basis for its position that property transferred to the spouse after the look back period is recoverable. This proposition is based on the Department's interpretation that "other arrangement" contained in 42 U.S.C. 1396p(b)(4)(B) includes property transferred by way of a Marriage Settlement Agreement. That section contains a laundry list of assets which may be recovered at the option of the State, "assets conveyed to a survivor, heir, or

assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement."

All of the specific transfers of property listed in that section occur in an automatic fashion upon the death of the owner. Under the Department's interpretation all arrangements or transfers of any type occurring after the look-back date would be "other arrangements". There is no specific mention of Marriage Settlement Agreements in that section.

Marriage Settlement Agreements are recognized under Idaho law and require specific statutory compliance 32-916 et. Seq. An MSA allows one spouse to transmute community property to the other. Furthermore, the Idaho legislature contemplated that transfers could be made by recipients of Medicaid and/or their spouses without compensation in order to avoid repayment. A remedy is provided in Idaho Code 56-218 (2) which addresses these transfers. That section provides that transfers of real or personal property, on or after the look-back dates defined in 42 U.S.C. 1396p, by recipients of such aid, or their spouses, without adequate consideration are voidable and may be set aside by an action in the district court.

A transfer of community property by a Marriage Settlement Agreement is not an automatic transfer like those specifically listed in 42 U.S.C. 1396(b)(4)(B). Another remedy for recovery is provided in Idaho Code 56-218(2). The Departments expansive interpretation to include all transactions is not reasonable.

Conclusion

The Marriage Settlement Agreement in this case has not been voided. The assets in the estate are the separate property of Emerson; there is no evidence to the contrary. The Department may only recover against property in which the recipient spouse had an interest at the time of her death. Since Vivian predeceased Emerson she has no legal interest in the Separate Property of Emerson under Idaho Law. The Department's Claim is disallowed.

BE IT SO ORDERED this 30th day of March 2010.

Gregory F. Frates, Magistrate Judge

Appendix 2

JUL 18 2011

Filed July 20, 2011
BETTY J. THOMAS 3:28 P.M.
Clerk District Court
By Tracie Wiedeneit Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IN THE MATTER OF THE ESTATE OF VIVIAN WIGGINS and EMERSON D. WIGGINS, Deceased.	Case No. CV-2009-1926 MEMORANDUM DECISION ON APPEAL

This matter came on for hearing on February 8, 2011, on appeal from the trial court's Memorandum Decision Denying Petitioner's Claim Against the Estate. Appellant was represented by Corey Cartwright, Deputy Attorney General, Human Services Division and the Respondent, who is the personal representative for the Estate of Vivian Wiggins and Emerson D. Wiggins, was represented by Brad Masingill. Respondent filed a Notice of Augmentation and/or Supplementation of his Brief on March 21, 2011, which included the recent appellate decision in the Ada County case of George D. Perry, CV-IE-2009-5214. The Court having heard and considered the arguments of counsel as well as the briefing filed, now issues this Memorandum Decision on Appeal.

I. FACTS

Vivian Wiggins was born [redacted] and died on January 30, 2009. Emerson Wiggins was born [redacted] and died on February 9, 2009. Vivian and Emerson were

married and continued to be married at the time they applied for Medicaid benefits and up until the time of Vivian's death. In June 2002, Vivian was admitted to a nursing home. Emerson and Vivian applied for medical assistance on November 18, 2002 to help pay for Vivian's medical care and again on August 27, 2003. Vivian became eligible for Medicaid on September 1, 2003, and between that time and Vivian's death, the Department of Health and Welfare (Department) paid for Vivian's medical care through Medicaid, in the sum of at least $272,134.68. The Department received a voluntary payment in April 2008, in the amount of $7,460.23, resulting in the Department's claim amount of $264,876.45.

A joint probate estate for Vivian and Emerson (the Estate) was opened on May 21, 2009, and the inventory which was filed shows assets of $78,659.44. On November 23, 2009, the Department filed a claim against the Estate for medical assistance paid on behalf of Vivian in the amount of $264,674.45. The Estate's personal representative filed a Notice of Disallowance of Claim on November 30, 2009. The trial court heard the Department's petition for allowance of a claim against the Estate on February 3, 2010. The parties stipulated in open court that the Department treated Vivian as if she had entered into a Marriage Settlement Agreement (MSA) in 2002 or 2003, but that a copy of the MSA cannot be found. The admitted purpose of the MSA was to transfer any assets in which Vivian had an interest to Emerson, as his sole and separate property, so that she would be considered eligible to receive Medicaid benefits. The trial court found that the assets in the Estate were Emerson's separate property based upon the MSA which had transmuted the community property to separate property, and there was no legal obligation owed by Emerson's Estate to repay the Department for his wife's care from his separate property. The trial court disallowed the Department's claim in its Memorandum Decision filed on March 30, 2010. The Department appealed that decision to this Court.

II. ISSUES ON APPEAL:

While the Department lists a number of issues in its opening brief, the basic assertion is that the Magistrate Judge erred in determining that a valid MSA existed and that the MSA transmuted Vivian and Emerson's community property to the separate property of Emerson from which the Department could not recover. The Department also argues that in making that determination, the trial court improperly interpreted and applied Idaho Code Section 56-218 and 42 U.S.C. 1396p. Both parties assert they are entitled to attorney fees on appeal.

III. LAW AND ANALYSIS

The Department has appealed the trial court's decision to deny the Department's Petition for Allowance of Claim seeking recovery from the Estate of money spent on Vivian's healthcare. The Department argues that it is entitled to recover this money under I.C. §56-218 from assets which were the separate property of Emerson at the time of Vivian's death. The Department also contends that Vivian's estate includes the property she transferred to Emerson through the MSA and is an asset which is subject to a claim for Medicaid reimbursement under both federal and state law. Finally, the Department asserts that it did not stipulate to all of the facts the magistrate judge relied on in his decision.

Respondent argues that under both state and federal law, the claim filed by the Department only applied to property in which Vivian had an interest as of the date of her death and does not apply against Emerson's separate property which he acquired when the MSA transmuted the community property to separate property.

A. Standard of review

When a district judge considers an appeal from a magistrate judge as an appellate proceeding, rather than exercising the option of granting a trial de novo, the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 596 (1992). A court's findings of fact are not clearly erroneous if they are supported by substantial and competent, though conflicting, evidence. I.R.C.P. 52(a). The trial court is the arbiter of conflicting evidence; its determination of the weight, credibility, inference, and implications thereof will not be supplanted by this Court's impressions or conclusions from the written record. *Johannsen v. Utterbeck*, 146 Idaho 423, 431-432, 196 P.3d 341, 349 - 350 (2008).

The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Interpretation of a statute begins with an examination of the statute's literal words. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. *Idaho Conservation League, Inc. v. Idaho State Dep't of Agric.*, 143 Idaho 366, 368, 146 P.3d 632, 634 (2006). Moreover, unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute. *Bunt v. City of Garden City*, 118 Idaho 427, 430, 797 P.2d 135, 138 (1990). In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending

substance and meaning to the provisions. *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 398, 224 P.3d 458, 465 (2008).

B. Stipulation of facts

At the hearing before the trial court, both the Department and the Estate, through their respective attorneys, stipulated to the fact that the Department treated Vivian and Emerson as if an MSA had been entered into between them prior to Vivian's receipt of Medicaid assistance. They further stipulated that the MSA was entered into for the purpose of transmuting Vivian's interest in the community property to Emerson's separate property so she could meet the eligibility requirements to receive Medicaid[1]. Both agreed that the original MSA could not be located. On appeal the Department is challenging the existence of the MSA and its effect in transmuting property, even though it failed to raise the issue with the trial court and appears, from the record, to have agreed to these facts. Based upon the parties' stipulation, the Court will not address this issue further.

C. Idaho Code Section 56-218(1)

The Department argues that I.C. §56-218(1) allows recovery from the estate of the recipient of Medicaid and also from the estate of the recipient's spouse. Respondent argues that the claim filed by the Department only applied to property in which Vivian had an interest as of the date of her death and does not apply against Emerson's separate property.

Idaho Code Section 56-218 is entitled "Recovery of certain medical assistance" and provides in part:

> (1) Except where exempted or waived in accordance with federal law medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the

[1] It appears the intent was to enable Vivian to become eligible for Medicaid assistance while at the same time leaving Emerson, who did not need nursing home care, with enough money on which to live while Vivian was in the nursing home.

> individual received such assistance may be recovered from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both....

The Department argues that this section gives broad authority for the Department to seek recovery from the spouse of a Medicaid recipient for any monies owed. Admittedly this part of the statute appears to allow such recovery, but there are additional provisions which narrow this authority.

Idaho Code §56-218(4) states as follows:

> For purposes of this section, the term "estate" shall include:
> (a) All real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law; and
> (b) Any other real and personal property and other assets in which the individual had any legal title or interest at the time of death, to the extent of such interest, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.

The Department agrees that "individual" as used in this statute refers to the recipient, i.e. Vivian. Thus, the question becomes, once the MSA was executed, was there any property in which Vivian had "any legal title or interest at the time of death?" It appears from a plain reading of this section that the recipient's estate includes not only property in which the recipient had a legal interest but also property which passed by operation of law to someone else at the time of the recipient's death. Neither of those circumstances would include property which the recipient had sold, given away or transferred prior to death.

Part of the difficulty is that the Department's interpretation of what should be included in the recipient's estate ignores Idaho community property law and does not address the impact of having separate property in the recipient's spouse's estate. Indeed, in its brief, the Department asserts that I.C. §56-218(1) "effectively alters marital property law in Idaho when it comes to the

property of Medicaid recipients and their spouses." There is no indication in this statute that the Idaho legislature intended such a sweeping change by simply authorizing the State to assert a claim against a recipient's spouse's estate.

Idaho Code defines separate property in Section 32-903 as:

> All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

A debt incurred by the Medicaid recipient is a community debt and clearly the recipient's interest in separate property or in the recipient's share of community property would be liable. Idaho Code §32-911 states: "The separate property of the wife [husband] is not liable for the debts of her husband [his wife], but is liable for her own debts contracted before or after marriage." Typically, under Idaho community property law, the spouse's separate property is not liable for debts incurred by the other spouse. I.C. § 32-912, entitled "Control of community property" provides:

> Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and *any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent;* provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated. (emphasis added)

There is nothing in the record to indicate that Emerson signed in writing agreeing to bind his separate property for the debts of Vivian. While that may very well have been part of the Medicaid application process, it is not in the record. Thus, while I.C. §56-218 gives the Department the legal authority to seek reimbursement from both spouses, it doesn't answer the question of which assets in the estate are liable for the Medicaid debt.

At the hearing in this matter, the Department admitted that it cannot pursue property that has always been the separate property of the recipient's spouse (even though this contradicts the Department's argument that I.C. 56-218 broadly allows recovery against both spouses' estates). The Department contends it can collect from separate property that was once community property if it was community property after October 1, 1993, and it justifies this position by citing to a Department rule that provides as follows:

> IDAPA 16.03.09.900.20 (deleted in 2010)
> 20. Limitations on Estate Claims. Limits on the Department's claim against the assets of a deceased participant or spouse are subject to Sections 56-218 and 56-218A, Idaho Code. A claim against the estate of a spouse of a participant is limited to the value of the assets of the estate that had been, at any time after October 1, 1993, community property, or the deceased participant's share of the separate property, and jointly owned property. Recovery will not be made until the deceased participant no longer is survived by a spouse, a child who is under age twenty-one (21), or a blind or disabled child, as defined in 42 U.S.C. 1382c as amended and, when applicable, as provided in Subsection 900.09 of this rule. No recovery will be made if the participant received medical assistance as the result of a crime committed against the participant. (3-30-07)
>
> IDAPA 16.03.09.900.24 (deleted in 2010)
> 24. Marriage Settlement Agreement or Other Such Agreement. A marriage settlement agreement or other such agreement which separates assets for a married couple does not eliminate the debt against the estate of the deceased participant or the spouse. Transfers under a marriage settlement agreement or other such agreement may be voided if not for adequate consideration. (3-30-07)

Both of the IDAPA rules that the Department relies on were deleted in 2010. At oral argument the Department was unable to justify the reasoning or logic to support its position that some separate property of the recipient's spouse is liable to the State while other separate property is not (apart from the Rule mentioned above).

Thus, while I.C. §56-218 gives the Department the authority to seek recovery from the estate of a Medicaid recipient's spouse, it does not answer the question of whether it controls over Idaho's community property law and allows recovery from separate property which would otherwise not be liable for community debts incurred by the recipient. Absent some clear authority, this Court does not read this statute to do so.

D. Meaning of "estate"

The Department argues that not only can it collect from separate property in Emerson's estate, but it can also collect from property which once belonged to Vivian. It makes this argument based on the definition of "estate" contained in federal and state laws. The Department argues that I.C. §56-218 authorizes recovery in this case because the statute does not say that recovery is limited to assets of the community. Respondent argues that the federal statute only provides recovery for property in Vivian's estate; property in which Vivian had an interest at the time of her death; and community property.

The Idaho Supreme Court has reviewed the federal Medicaid program and its relationship with the state. "While it is often thought of as providing medical care only for the indigent, it also provides coverage for the aged whose income and resources are insufficient to meet the costs of necessary medical services including nursing home care." *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 534, 181 P.3d 456, 460 (2008). The States operate Medicaid by their own design but these programs must be consistent with federal standards and regulations. *Id.* Both the federal government and the state government expect federal law to

predominate in determining qualifications for receipt of Medicaid assistance. *Id.* Finally, the Court went on to comment that: "Over the years, as the Medicaid program evolved from strictly an indigent assistance program to one that provided assistance to elderly persons who struggle to meet the cost of medical and nursing home care, steps were taken to keep those recipients from having to divest themselves of their home and other basic resources." *Id.*

The definitions of "estate" under state law and federal law are similar. The state definition which is found at I.C. §56-218(4) was previously quoted above. The federal law governing Medicaid defines "estate" in Title 42 U.S.C.A. § 1396p as follows:

> (b) Adjustment or recovery of medical assistance correctly paid under a State plan
> **(4)** For purposes of this subsection, the term "estate", with respect to a deceased individual--
> **(A)** shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
> **(B)** may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

Thus federal law includes all assets in the recipient's estate which would be allowed under state probate law, and also allows the state to broaden "estate" for purposes of recovering medical assistance to include other property in which the recipient had an interest at the time of death, as Idaho has. Federal law does not discuss the impact of state community property laws and, presumably, that must be up to the state.

The Department admitted that the state and federal definitions of "estate" apply only to the "individual's" estate (i.e. recipient, not spouse of recipient). The Department also agrees that Vivian had no legal interest in any property at the time of her death; however, it argues that the

federal definition of "assets" found in 42 USC 1396p(h)(1) must be incorporated. The federal law governing Medicaid defines "assets" in Title 42 U.S.C.A. § 1396p as follows:

> (h) Definitions
> In this section, the following definitions shall apply:
> **(1)** The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--
> **(A)** by the individual or such individual's spouse,
> **(B)** by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
> **(C)** by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

That provision, which is difficult to understand at best, broadens what should be included in the recipient's estate and appears to include resources which the recipient would have had in his or her estate but for the actions of the recipient or the recipient's spouse. While this would appear to include property transmuted by virtue of an MSA as the Department argues, there is nothing in the statute that makes this happen automatically. In other words, simply because the definition of "assets" could include that property doesn't mean that such transactions are set aside without further action. There should be some action taken to recover those resources into the recipient's estate, such as setting aside the MSA, which will be discussed later in this Decision.

E. Effect of *Idaho Dept. of Health and Welfare v. Jackman*

In its brief, the Department argues that the issue presented by this appeal has already been decided by the Idaho Supreme Court in *Idaho Dept. Of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998). That case does have facts similar to those in this case but it addressed the version of I.C. §56-218 in effect in 1993. In *Jackman*, a marriage settlement agreement was signed, which transmuted most of the wife's community property into the

separate property of the husband. After the wife died, her estate was probated and the money left in her estate was paid to the State as partial reimbursement for the Medicaid paid on behalf of the wife. After the husband died, the State sought to obtain additional monies owed for the wife's care from the husband's estate. The Court held that the federal statute regarding recovery of Medicaid assistance as it existed in 1993, did not permit the Department to recover from the husband's estate. This was so because the definition of "assets" from which recovery could be made excluded "assets disposed of on or before [Aug. 10, 1993]." Because the MSA executed by Jackman was signed prior to this date, any assets transferred by that document were excluded. While the Supreme Court did talk about the effect of the 1993 amendments in broadening the definition of "assets," that was not necessary to the Court's decision based on its reasoning. The Court was not presented directly with the question of whether, under the law as it now exists, federal law would trump state community property laws in making separate property liable for debts that could otherwise not be recovered from separate property.

While it would seem that the Department has no recourse against assets transferred to the recipient's spouse, there is an additional provision which allows it to set aside the MSA and place the assets back in the recipient's estate. Thus, regardless of how the terms "estate" and "assets" are interpreted, there is a process through which the Department can set aside the MSA and can collect current or former community property from both spouses' estates as if the MSA never existed.

F. Application of I.C. §56-218 (2)

Idaho Code Section 56-218(2) states:

> Transfers of real or personal property, on or after the look-back dates defined in 42 U.S.C. 1396p, by recipients of such aid, or their spouses, without adequate consideration are voidable and may be set aside by an action in the district court.

This statute has also been incorporated into a Department rule:

> IDAPA 16.03.09.900.24 (deleted in 2010)
> 24. Marriage Settlement Agreement or Other Such Agreement. A marriage settlement agreement or other such agreement which separates assets for a married couple does not eliminate the debt against the estate of the deceased participant or the spouse. Transfers under a marriage settlement agreement or other such agreement may be voided if not for adequate consideration. (3-30-07)

If the terms "estate" and "asset" are as broad as has been argued by the Department, those terms would automatically include any property transferred by an MSA and there would be no need to set aside such an agreement. Not every transfer of property by a Medicaid recipient is improper or without adequate consideration, nor should transferred property automatically be included in the individual's estate and be liable for reimbursement of Medicaid benefits paid. Some action should be required in order for those resources to be included and I.C. §56-218(2) is the vehicle for doing so.

The Department argues this provision is of no use to them in cases like the current one because there is a three-year statute of limitations for setting aside the MSA and that ran in 2005, well before Emerson died. This is a matter which could be addressed by the Idaho legislature in order to give the Department more time within which to set aside the MSA. It is not a justification for broadly interpreting the meaning of "estate" or amending Idaho community property law so the Department doesn't have to go through the process of setting aside an MSA.

The Department further argues that it can't go back and void the MSA after the fact because that would render Vivian "ineligible" for benefits, meaning that she should never have received benefits in the first place. That argument ignores the fact that I.C. §56-218 (2) specifically provides that any transfer of property without adequate consideration is "voidable" not "void". A voidable contract is one in which the parties have the power to avoid the contract

provisions, or they can ratify it and it will continue in effect. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 180, 45 P.3d 829, 836 (2002); Restatement (Second) of Contracts, §7. A void contract is one that is treated as if it never existed, void *ab initio*. The consequences of voiding a voidable contract vary depending on the circumstances; thus, setting aside the MSA would not necessarily retroactively affect benefits already paid to the recipient.

Moreover, 42 USC 1396p(c)(2)(B)(i), which governs asset transfers for the purposes of Medicaid reimbursement provides in part as follows:

> (2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--
> ***
> (B) the assets--
> (i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

This means a recipient is not ineligible for benefits by reason of having disposed of assets for less than their fair market value to the extent that the assets were transferred to a spouse for the spouse's benefit. That is exactly what I.C. §56-218 (2) is designed for – it allows the State to set aside transfers that lack consideration, and the transfer doesn't render the recipient ineligible for benefits.

G. Attorney fees

Both parties have asserted a right to attorney fees pursuant to Idaho Code §12-117 which provides as follows:

> (1) Unless otherwise provided by statute, in any administrative proceedings or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

It is this Court's view that the questions presented by this appeal are difficult and complex, involving interpretation of state and federal Medicaid benefits law. While this Court has concluded that the magistrate judge was correct in denying the Department's claim, the answer is by no means simple or clear and both parties presented persuasive arguments regarding their views of how the statutes and administrative rules should be interpreted. This is clearly not a situation where either party acted "without a reasonable basis in fact or law" and therefore, both requests for attorneys fees on appeal are denied. The Respondent is entitled to its costs on appeal.

IV. CONCLUSION

The burden is on the Department to assert a cognizable claim against Vivian and Emerson's Estate and to support it by citation to some statute. The statutes must be clear that not only can the Department collect from the recipient, Vivian, but that there's a statutory basis for claiming property of Emerson which would otherwise not be liable for Vivian's debts under Idaho's community property law. While Vivian's estate could have included property she transmuted to Emerson utilizing I.C. §56-218 (2), that was not done in this case. Broadening the meaning of "estate" under Idaho law in order to reach Emerson's separate property, or altering accepted community property law, is not an alternative solution to allow recovery to the Department. Based on the reasoning above, the decision of the trial court is AFFIRMED.

DATED this 15th day of July, 2011.

Linda Copple Trout
Senior District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellate Decision is forwarded to the following persons on this 20th day of July 2011.

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CLERK OF THE DISTRICT COURT

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Deputy Clerk

Appendix 3

No. 08-603

In the Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Medicaid program, 42 U.S.C. 1396 *et seq.*, generally forbids participating States from recovering correctly paid benefits. The statute requires, however, that a State seek to recover the cost of nursing home services paid on behalf of an individual over the age of 55 from the individual's probate estate, after both the individual and her surviving spouse have died. The statute also permits (but does not require) a State to recover from "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(4)(B).

The question presented is whether, under Section 1396p(b)(4)(B), a State that seeks to recover correctly paid benefits from the estate of the recipient's surviving spouse is limited to recovering the value of assets in which the recipient had a legal interest at the time of her death.

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In the Supreme Court of the United States

No. 08-603

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Medicaid program, established in 1965 in Title XIX of the Social Security Act (Medicaid Act), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program under which the federal government provides funding to States to provide medical assistance to eligible needy persons. *Harris* v. *McRae*, 448 U.S. 297, 301 (1980).

To participate in the Medicaid program, a State must develop a plan specifying, among other things, the categories of individuals who will receive medical assistance

under the plan and the specific kinds of medical care and services that will be covered. 42 U.S.C. 1396a. State Medicaid plans are reviewed by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration) in the Department of Health and Human Services (HHS). 42 U.S.C. 1396; see 66 Fed. Reg. 35,437 (2001). If CMS approves a State's plan, the State is thereafter eligible for federal reimbursement for a specified percentage of the amounts "expended * * * as medical assistance under the State plan." 42 U.S.C. 1396b(a)(1), 1396d(b).

b. The Medicaid Act requires participating States to provide Medicaid benefits to the "categorically needy," that is, those persons eligible for financial assistance under specified federal programs. *Atkins v. Rivera*, 477 U.S. 154, 157 (1986); see 42 U.S.C. 1396a(a)(10)(A)(i)(IV), (VI) and (VII).

The Act also permits States to extend benefits to the "medically needy," that is, "persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance." *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); see 42 U.S.C. 1396a(a)(10)(C). To qualify as medically needy, a person may have income no higher than a defined threshold and may own assets of an more than a defined value. If the assets of a Medicaid applicant exceed the qualifying threshold, she must "spend down" her assets until they are at or below the qualifying threshold. See 42 U.S.C. 1396a(a)(17).

When a married person is institutionalized in a nursing home or other facility, the Medicaid Act considers the assets of both the institutionalized spouse and the non-institutionalized, or "community," spouse in determining the applicant's eligibility for benefits. 42 U.S.C.

1396r-5(c). To prevent the community spouse from being impoverished as a result of a required spend-down of assets, the statute exempts certain assets, such as the couple's home and an automobile, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain a certain level of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). *See Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 480 (2002) (anti-impoverishment provisions are intended to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance"). Furthermore, although the Medicaid Act generally forbids a Medicaid applicant or her spouse from transferring assets at below market value in order to become eligible for benefits, 42 U.S.C. 1396p(c)(1)(A), the statute expressly permits the applicant to transfer assets, including an interest in the homestead, to the community spouse, 42 U.S.C. 1396p(c)(2). Once the institutionalized spouse is determined to be eligible for benefits, the statute provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4).

c. As a general rule, the Medicaid Act forbids States from seeking recovery of Medicaid benefits that were correctly paid. 42 U.S.C. 1396p(b)(1); see also 42 U.S.C. 1396a(a)(18). The statute provides an exception, however, for recovery from the estates of certain institutionalized and older beneficiaries.

Before 1993, the Medicaid Act's recovery provision permitted, but did not require, States to recover benefits paid on behalf of certain individuals, from the individuals' estates. 42 U.S.C. 1396p(b)(1)(B) (1993). In 1993,

Congress amended Section 1396p to require States to recover correctly paid benefits in certain circumstances. Omnibus Reconciliation Act of 1993 (OBRA 1993), Pub. L. No. 103-66, § 13612, 107 Stat. 627. As amended, the Act's estate-recovery provision requires States to seek recovery in the case of an individual who was permanently institutionalized, 42 U.S.C. 1396p(b)(1)(A), and in the case of a person who received, at age 55 or thereafter, nursing facility services, home and community-based services, or related hospital and prescription drug services, 42 U.S.C. 1396p(b)(1)(B). In addition, a State has the option to seek recovery of the cost of other items or services paid on behalf of individuals over the age of 55. *Ibid.* The recovery "may be made only after the death of the individual's surviving spouse, if any," and only at a time when the individual has no surviving children under the age of 21 or children who are blind or disabled. 42 U.S.C. 1396p(b)(2) and (2)(A). Such recovery may be waived in cases where it "would work an undue hardship." 42 U.S.C. 1396p(b)(3).

The statute provides for recovery of the cost of benefits paid on behalf of an individual over the age of 55 from "the individual's estate." 42 U.S.C. 1396p(b)(1)(B). The term "estate," for those purposes, "shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." 42 U.S.C. 1396p(b)(4)(A). The statute further provides that an individual's "estate"

> may include, at the option of the State * * *, any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint ten-

ancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. 1396p(b)(4)(B).

2. Since 1987, Minnesota law has provided for recovery of Medicaid benefits from the estate of a recipient's surviving spouse, as well as from the estate of a recipient. Act of June 12, 1987, ch. 403, art. 2, § 32 (Minn. Stat. Ann. § 256B.15 (2007)). Minnesota's estate-recovery law provides that "[a] claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. Ann. § 256B.15, subd. 2 (2007).

3. In 2004, petitioner filed a claim against the estate of Francis Barg, in which he sought recovery of Medicaid benefits paid on behalf of Mr. Barg's predeceased spouse, Dolores Barg. Pet. App. 4a.[1]

a. During their marriage, the Bargs purchased real property in Princeton, Minnesota, to which they took title as joint tenants. In 2001, Ms. Barg entered a nursing home, and shortly thereafter applied for, and received, long-term Medicaid benefits. Pet. App. 2a-3a. Ms. Barg subsequently transferred her joint tenancy interest in the homestead property to Mr. Barg. At the time of the transfer, the assessed value of the property was $120,300. Ms. Barg also terminated her ownership interest in certificates of deposit the couple had held jointly. *Id.* at 3a-4a.

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[1] On March 2, 2009, this Court granted the State of Minnesota's conditional motion to intervene as a party aligned with petitioner Vos. All references in this brief to "petitioner" refer to petitioner Vos.

Ms. Barg died in 2004, having received a total of $108,413.53 in medical-assistance benefits through the state Medicaid program. Mr. Barg died five months later. Pet. App. 4a.

b. In his claim against Mr. Barg's estate, petitioner sought to recover the full amount of Medicaid benefits paid on behalf of Ms. Barg. Pet. App. 4a. Respondent, who is the representative of Mr. Barg's estate, allowed $63,880 as a claim against the estate, but disallowed $44,533.53. *Ibid.*[3]

Petitioner filed a claim-allowance petition in state court. The district court upheld the partial disallowance. Pet. App. 46a-51a. The court relied on the Minnesota Court of Appeals' decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (2002), which held that Minnesota's estate-recovery law is preempted insofar as it permits recovery up "to the value of the assets of the estate that were marital property" at any point in the marriage, because 42 U.S.C. 1396p(b)(2)(B) permits recovery only "to the extent of" the Medicaid recipient's interest at the time of death. *Gullberg*, 652 N.W.2d at 714. The court concluded that, at time of her death, Ms. Barg's interest in the assets of Mr. Barg's estate that were marital property, including a life-estate interest in the homestead and a personal property allowance, totaled $63,880. Pet. App. 50a-51a.

c. The Minnesota Court of Appeals reversed and remanded for recalculation of petitioner's allowable claim. Pet. App. 52a-64a. Like the district court, the

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[3] Respondent's partial allowance of $63,880 apparently rested on the premise that Ms. Barg (1) had a one-half interest in the homestead, valued at $58,880, at the time of her death, despite the inter vivos transfer, and (2) was entitled to a personal property allowance in the amount of $5000. See Pet. App. 42a.

court of appeals concluded that, under federal law, the claim was necessarily limited to the value of Ms. Barg's interest in specified assets at the time of her death. *Id.* at 58a (citing *Gullberg*, 652 N.W.2d at 714). The court of appeals concluded, however, that Ms. Barg's interest in the homestead at the time of her death was a joint tenancy interest, valued as a one-half interest in the property's value of $120,800, or $60,400. *Id.* at 62a.

d. The Minnesota Supreme Court affirmed in part and reversed in part, concluding that petitioner was not entitled to full recovery from Mr. Barg's estate. Pet. App. 1a-45a.

As an initial matter, the court rejected respondent's contention that federal law completely preempts Minnesota's estate-recovery law insofar as it permits recovery from the estate of the Medicaid recipient's surviving spouse. Pet. App. 19a-30a. The court concluded that allowing recovery from a surviving spouse's estate is consistent with both the Act's preclusion of recovery from the Medicaid recipient's estate until after the death of a surviving spouse, 42 U.S.C. 1396p(b)(2)(A), as well as the purposes of the Medicaid Act's recovery provisions. Pet. App. 29a.

The court concluded, however, that federal law limits the scope of recovery against a surviving spouse's estate to the value of assets in which the recipient spouse had an interest "at the time of death," 42 U.S.C. 1396p(b)(4)(B), and thereby preempts Minnesota's estate-recovery law insofar as it permits the State to reach any other assets "that were marital property or jointly owned property *at any time during the marriage*." Pet. App. 31a (quoting Minn. Stat. Ann. § 256B.15, subd. 2 (2007)); see *id.* at 30a-37a.

The court further concluded that Ms. Barg did not have any interest in the homestead or bank accounts at the time of her death, because she had transferred her interest in those assets to Mr. Barg before she died. The court therefore held that petitioner had no legal entitlement to satisfaction of the State's claim from those assets. Pet. App. 37a–43a. But because respondent had partially allowed petitioner's claim, and never challenged the district court's award of that partial allowance of $63,880, the Minnesota Supreme Court held that petitioner could recover that amount. *Id.* at 43a–45a.

DISCUSSION

The Minnesota Supreme Court's decision is correct and does not warrant further review. The federal Medicaid Act permits recovery of correctly paid benefits from the estate of the recipient's surviving spouse, but limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death.

Although the result in this case differs from the result in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000), the difference may not reflect a disagreement about the meaning of federal Medicaid law, but only divergent conclusions about when, under state law, an individual retains a legal interest in assets conveyed to a spouse. The petition for a writ of certiorari should be denied.

A. The Decision Of The Minnesota Supreme Court Is Correct

1. The Minnesota Supreme Court correctly concluded that the Medicaid Act forbids petitioner from seeking to recover correctly paid benefits from assets in which the Medicaid recipient had no legal interest at the time of her death.

Under the Medicaid Act, a State generally may not seek to recover correctly paid Medicaid benefits. 42 U.S.C. 1396p(b)(1). The Act provides, however, that a State (1) *must* seek recovery of nursing home and related benefits paid on behalf of an individual over the age of 55 from "the individual's estate" as defined by state probate law; and (2) *may*, at its option, define "the individual's estate" more broadly to include any "assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(1)(B), (b)(4)(A) and (B). Thus, the Medicaid Act, which permits recovery only after the death of the recipient's surviving spouse, 42 U.S.C. 1396p(b)(2), authorizes a State to file a reimbursement claim against the surviving spouse's estate, up to the value of any assets in which the Medicaid recipient had a legal interest at the time of her death.

The Minnesota estate-recovery law exceeds the scope of that authorization. It permits the State to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*," Minn. Stat. Ann. § 256B.15, subd. 2 (2007) (emphasis added), without regard to whether the recipient retained an interest in the assets at the time of her death. Because a State may not recover correctly paid Medicaid benefits except to the extent authorized by federal law, see 42 U.S.C. 1396p(b)(1), Minnesota's statute conflicts with federal law and is therefore preempted. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-282 (1987).

2. Petitioner argues (Pet. 25-29) that the text of the Medicaid Act imposes no limit on permissible recovery from the estate of the Medicaid recipient's surviving spouse, because the Act defines the term "assets" to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. 1396p(b)(1). According to petitioner, "[b]y including resources of both 'the individual' and 'of the individual's spouse' in the meaning of 'assets,' Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B)." Pet. 27.

Petitioner is incorrect. Although the general statutory definition of "assets" does encompass resources of both "the individual" (i.e., the Medicaid recipient) and "the individual's spouse," the particular provision of the Medicaid Act at issue here refers specifically to any "assets in which *the individual* had any legal title or interest at the time of death." 42 U.S.C. 1396p(b)(4)(B) (emphasis added). Petitioner's argument finds it necessary to rewrite that clause to read "'any * * * assets in which [*either or both the individual and the individual's spouse*] had any legal title or interest.'" Pet. 26 (brackets and asterisks in original) (emphasis added). But this editing does nothing less than make the statute say the opposite of what it says. The plain language of the operative provision of the Act refutes petitioner's reading.[3]

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[3] In describing the operation of the amended estate-recovery provision, the legislative history of the 1993 amendments also focused on the assets of the individual who had received Medicaid benefits, rather than the resources of both the individual and his or her spouse. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 585 (1993) ("At the option of the State, the estate against [which] * * * recovery is sought may include any real or personal property or other assets in which *the*

3. Petitioner's reading of the Medicaid Act also finds little support in the Act's other provisions concerning the treatment of spousal assets. See Pet. 27-28. As petitioner notes, the Medicaid Act generally considers the community spouse's assets for purposes of determining whether an institutionalized individual is eligible to receive benefits. But the Act also exempts certain property, such as the couple's home, from consideration, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain certain amounts of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). Moreover, once the institutionalized spouse is determined to be eligible for benefits, the Medicaid Act provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4). The Medicaid Act, in short, imposes significant limitations on petitioner's asserted principle that "spouses are expected to support each other." Pet. 27. To read Section 1396p(b)(4)(B) in accordance with its plain terms thus is consistent with the broader statutory scheme.

4. Because Section 1396p(b) leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death, the presumption against preemption does not come into play, Pet. 23 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))—even assuming, arguendo, that this presumption has force in the context of a comprehensive federal-state cooperative program like Medicaid in which the State's program is sub-

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beneficiary had any legal title or interest at the time of death, including the home.") (emphasis added).

ject to federal approval. And for similar reasons, petitioner's suggestion that the decision below improperly enforces against the State "[a]n ambiguous condition" on the acceptance of federal funds under Spending Clause legislation lacks any merit. Pet. 23 n.8 (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

Petitioner also errs (Pet. 20-23, 23 n.8) in asserting that the Minnesota Supreme Court's interpretation of Section 1396p(b)(4)(B) is inconsistent with the interpretation of the responsible federal agency. HHS has neither promulgated regulations nor issued guidance interpreting Section 1396p(b)(4)(B) to authorize the kind of estate recovery that petitioner urges in this case. To be sure, CMS in 2007 approved Minnesota's state plan amendment incorporating its statutory spousal recovery provisions. See Pet. App. 89a-98a. But CMS's approval is not the equivalent of binding interpretive guidance. Cf. 42 C.F.R. 430.16(a)(1) (a state plan or plan amendment is deemed approved if CMS does not act within 90 days after submission). Moreover, CMS's approval followed binding judicial decisions in Minnesota's own courts interpreting the Medicaid Act to limit recovery to assets in which the Medicaid recipient had an interest at time of death. See, *e.g.*, *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002). As set forth above in this brief, see p. 9, *supra*, HHS also interprets the Medicaid Act to limit recovery in that manner.

B. The Decision Below Does Not Warrant Further Review

1. Petitioner contends (Pet. 24-25) that review is warranted to resolve a conflict between the decision below and the North Dakota Supreme Court's decision in

Wirtz, *supra*.[4] In *Wirtz*, much as in this case, a Medicaid recipient had transferred assets to his spouse before his death, and the State sought to recover the cost of the Medicaid benefits from the spouse's estate after her death. The court held that the State was permitted under 42 U.S.C. 1396p(b)(4)(B) to recover the value of any assets "in which the deceased recipient once held an interest," including assets conveyed to his spouse before his death. *Wirtz*, 607 N.W.2d at 856.

But the different results in this case and in *Wirtz* may not reflect a disagreement about the meaning of federal Medicaid law. Notably, the North Dakota Supreme Court, like the Minnesota Supreme Court, stated that the State "[could] assert a claim against real or personal

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[4] As the Minnesota Supreme Court noted (Pet. App. 21a-22a), two other state courts have concluded that Section 1396p(b) authorizes recovery only from the estate of a Medicaid recipient, and not from the estate of his or her spouse. See *Hines* v. *Department of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995). But those decisions and the decision below are not in conflict. Both *Hines* and *Budney* are consistent with the principle that a State may recover from the estate of a Medicaid recipient's surviving spouse if it exercises its option under Section 1396p(b)(4)(B) to define the individual's estate more broadly than it is defined under state probate law. See *Hines*, 850 N.E.2d at 153-154 (explaining that the state legislature could have defined the recipient's estate in such a way as to provide for recovery of certain assets from the estate of his surviving spouse, but had chosen not to do so); *Budney*, 541 N.W.2d at 248 & n.3 (holding that a state statute authorizing full recovery from a surviving spouse's estate exceeded the State's authority under 42 U.S.C. 1396p(b), without considering whether it would have been permissible for the State to recover from the surviving spouse's estate the value of assets in which the recipient had an interest at the time of death). Respondent here, in any event, does not challenge the Minnesota Supreme Court's conclusion that a State is permitted to recover from the estate of a surviving spouse in some circumstances. See Br. in Opp. 4, 8-9, 19.

property, and other assets in which [the recipient] had any legal title or other interest *at his death*." *Wirts*, 607 N.W.2d at 885 (emphasis added); see also *ibid.* ("Our inquiry * * * is * * * whether [the recipient] had 'real and personal property and other assets in which [he] had any legal title or interest *at the time of death*.") (emphasis added). Although its reasoning is not entirely clear, the court in *Wirts* appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, retained an interest in the relevant property until his death, when the interest was conveyed to his spouse through "other arrangement." 607 N.W.2d at 885 (quoting 42 U.S.C. 1396p(b)(4)(B)). The court did not elaborate on the nature of that interest, although it referred to the State's argument that the recipient had retained a "marital or equitable interest" in the assets at the time of his death, *id.* at 883, and noted that other courts had interpreted Section 1396p(b)(4)(B) to reach state-law community-property and homestead interests, *id.* at 885.

The different results reached by the North Dakota Supreme Court and the court below on similar facts thus may reflect not conflicting interpretations of federal Medicaid law, but only different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse. Compare *Wirts*, 607 N.W.2d at 885-886, with Pet. App. 38a-40a (concluding that, after Ms. Barg transferred her interest in the homestead and bank accounts, she no longer had a legal interest that could have been conveyed to Mr. Barg upon her death), and *id.* at 40a (noting that Minnesota law "makes no reference to * * * re-defining the probate estate to include all marital property, even property transferred prior to death").

Even if the decisions in *Wirta* and this case do reflect a disagreement as to proper interpretation of the Medicaid Act, this Court's review would not be warranted. The Minnesota Supreme Court's interpretation of federal law is correct, and to date, only the North Dakota Supreme Court has allowed Medicaid recovery following an inter vivos transfer of assets between spouses. Assuming arguendo that the North Dakota Supreme Court misunderstood federal Medicaid law, rather than simply applied a peculiar feature of its own property law, the North Dakota court has not had an opportunity to consider HHS's interpretation, and the conflict may work itself out as the issue is further addressed in the lower courts.

2. Although petitioner (Pet. 31-33) is correct that estate-recovery efforts are important to the Medicaid program, questions concerning the scope of the Act's estate-recovery provisions have not arisen frequently, and relatively few States have opted to seek estate recovery to the maximum extent permitted by federal law. See Office of Assistant Secretary for Policy & Evaluation, HHS, *Policy Br. No. 8, Medicaid Estate Recovery Collections* tbl. 4 (Sept. 2006) (only nine States make maximum use of federal policy options); see also Pet. 31.

Moreover, although the federal Medicaid Act limits estate recovery to those assets in which the Medicaid recipient had a legal interest at the time of her death, the nature and extent of such interests remain largely the domain of state law. Notably, Minnesota's Governor has proposed redefining marital property interests to permit recovery of medical assistance from the estate of the later-surviving spouse in this context. See *Governor's Recommendation, Minnesota State Budget, 2010-11 Biennial Budget, Human Services Dep't* 132 (Jan. 27,

2009). That proposal has not become law, nor has it been reviewed by the Secretary of HHS. The proposal, however, suggests that Minnesota may be able to work toward greater asset recovery consistent with the clear terms of federal Medicaid law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

Appendix 4

DEPARTMENT OF HEALTH & HUMAN SERVICES

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JUL 09 1999

June 29, 1999

Roderick D. Gere
Idaho Legal Aid Services
310 North 5th Street
Boise, ID 83701-1683

Dear Mr. Gere:

This is in response to your letter of May 18, 1999 regarding the interaction of the transfer provisions of 42 U.S.C 1396p of the Social Security Act and 42 U.S.C. 1396r-5(c)(4), the spousal impoverishment provisions of the same Act. We appreciate this opportunity to clarify these issues. This office recently received an interpretation from the Headquarters, Health Care Financing Administration that we believe addresses your concerns.

The transfer of assets from the community spouse to his or her heirs via a will is not grounds for invoking a penalty against the institutionalized spouse for transferring assets for less than fair market value. Under the transfer of assets provisions, transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the eligibility determination any resources belonging to the community spouse are solely the property of that spouse. That spouse can do whatever he or she wants to with them, including leaving them, via a will, to particular heirs that do not include the institutionalized spouse.

Further, a transfer of resources via will from the community spouse to various heirs would fall under one of the specific exemptions from transfer penalties found in section 1917(c) of the Act; specifically, the exemption for assets transferred for a purpose other than to receive Medicaid. In the event an institutionalized spouse has already been determined eligible for Medicaid, the resources belonging to the community spouse have no impact on the institutionalized spouse's eligibility, and transferring those resources to various heirs via a will likewise does not affect the institutionalized spouse's eligibility.

We believe this information addresses the concerns raised in your letter. In the event you have further questions in this regard, please contact Dennis Sexton at (206) 615-2398.

Sincerely,

for: Dennis W. Sexton

Robert Reed, Chief
Medicaid Branch
Division of Medicaid and State Operations

cc: Karl Kurtz, Director, IDHW

DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION

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April 5, 2000

Brian E. Barreira, Attorney-At-Law
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Plymouth, Massachusetts 02360

Dear Mr. Barreira

This is in reply to your letter concerning transfer of assets by community spouses. You advised us that it is the position of the Division of Medical Assistance (DMA) that the post-eligibility transfer made by community spouses causes Medicaid disqualification. Thus, you requested that we notify DMA of its need to come into compliance with Federal law.

Under the transfer of assets provisions in §1917(c) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of §1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.

We will be writing a letter to Mark F. Reynolds, Acting Commissioner, DMA, advising him that State policy needs to be revised to be consistent with Federal requirements. We appreciate your interest in the Medicaid program and for bringing this matter to our attention.

Please contact Allen Bryan if you have any questions. He can be reached at (617) 565-1246

Sincerely yours,

Ronald Preston
Associate Regional Administrator